LIBRARY
SUPREME COURT, U. S.

FILED
MAY 28 1969
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, [redacted] 1969

No. [redacted] 168

MARION J. BELVEAL, ET AL.,
Petitioners,

vs.

SOCONY MOBIL OIL CORPORATION AND CHARLES B. ATHEY AND JACK D. HODGDEN,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS FOR THE EIGHTH SUPREME JUDICIAL DISTRICT OF TEXAS AT EL PASO, TEXAS

JOHN J. WATTS
P. O. Box 1031
Odessa, Texas

JOHN G. PATTERSON
2323 Houston Natural Gas Bldg.
Houston, Texas

V. F. KNICKERBOCKER
P. O. Box 1132
Midland, Texas

Attorneys for Petitioners

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, HArrison 1-3030

TABLE OF CONTENTS

I. Jurisdiction 2

II. Questions Presented 3

III. Statutes, Rules and Constitutional Provisions Involved 7

IV. Statement of the Matter Involved 9

V. Reasons for Granting Writ 17

Presentation of Federal Questions 54

Conclusion 55

Certificate of Service 55

Appendix—

Exhibit A—Opinion, El Paso Court of Civil Appeals, Eighth Judicial District of Texas A1

Exhibit B—Order Overruling Application of Petitioners for Writ of Error A9

Exhibit C—Order Overruling Motion for Rehearing A9

Exhibit D—Motion for Discovery A11

Exhibit E—Order for Discovery and Producing of a Document, etc. A21

Exhibit EA—Motion for Recall and Stay of Judgment Issued As Mandate A24

Exhibit EF—Order Recalling and Staying Judgment Issued as Mandate A27

Exhibit F—Point No. 12 on Motion for Rehearing A29

Exhibit G—Point No. 19 in Application for Writ of Error A29

Exhibit H—Point No. 20 in Application for Writ of Error A30

Exhibit I—Affidavit of J. K. Brim A31
Exhibit J—Conclusion of Motion for Rehearing A33
Exhibit K—Response of Petitioners Challenging As Untrue Certain Statements Made in the Last Response Filed by Mobil Oil Corporation A39

Table of Authorities

CASES

Ackermann v. *U. S.*, 178 F.2d 983, affirmed 71 S.Ct. 209, 340 U.S. 193, 95 L.Ed. 207, followed in 179 F.2d 236, certiorari granted 70 S.Ct. 996, 339 U.S. 962, 94 L.Ed. 1371 47-48
Adam v. *Saenger*, Tex., 58 S.Ct. 28, 302 U.S. 668, 82 L.Ed. 515, gr'g certiorari 101 S.W.2d 1046, rev. 58 S.Ct. 454, 303 U.S. 59, 82 L.Ed. 649, rehearing denied 58 S.Ct. 640, 303 U.S. 666, 82 L.Ed. 1123, conformed to 119 S.W.2d 687, certiorari denied *Saenger* v. *Adam*, 59 S.Ct. 832, 307 U.S. 628, 83 L.Ed. 1511 10
Alexander v. *Bank of America National Trust and Savings Assn.*, 401 S.W.2d 688 ..... 25, 30
Allison v. *Harrison*, 156 S.W.2d 137 ..... 22, 24
American Broadcasting Co. v. *Federal Communications Commission*, 179 F.2d 437, 85 U.S. App. D.C. 343 47
Armstrong v. *Manzo*, 380 U.S. 545, 14 L.Ed.2d 62 ... 40, 41, 42
Binford v. *Snyder*, 189 S.W.2d 471 17
Box v. *Bates*, 341 S.W.2d 219 23
Cochran v. *Wool Growers Storage*, 160 S.W.2d 904 25
Courseview, Inc. v. *Phillips Petroleum Company*, 312 S.W.2d 197 ..... 12, 52
Goldsmith v. *Cathey*, Civ. App. 1960, 331 S.W.2d 358, ref. n.r.e. 17
Great American Reserve Insurance Company v. *San Antonio*, 391 S.W.2d 41 26
Hart v. *Johnson*, 389 F.2d 239 (1968) 46

In re Oliver, 68 S.Ct. 499, 333 U.S. 257, 92 L.Ed. 682 47

Michigan-Wisconsin Pipe Line Co. v. *Calvert*, Tex., 74 S.Ct. 396, 347 U.S. 157, 98 L.Ed. 583, rehearing denied 10

Michigan-Wisconsin Pipe Line Co. v. *Calvert*, 74 S.Ct. 528, 347 U.S. 931, 98 L.Ed. 1083 10

Mills v. *Alabama*, (1966) 384 U.S. 214, 16 L.Ed.2d 484, 86 S.Ct. 1434 3

Mullane v. *Central Hanover Bank & Trust Co.*, 70 S.Ct. 652, 339 U.S. 306, 94 L.Ed. 865 47

National Surety Company v. *Jackson*, 20 F.2d 644 22

Panhandle Eastern Pipe Line Co. v. *Calvert*, 74 S.Ct. 528, 374 U.S. 931, 98 L.Ed. 1083 10

Pierce v. *Hildebrand*, 103 F. Supp. 396 47

Pratt v. *Shell Petroleum Corporation*, 100 F.2d 833 ....50, 51

Pullman Co. v. *Nelson*, 22 Tex. Civ. App. 223, 54 S.W. 624 29

Radic v. *Fullilove*, 198 F. Supp. 162 .....43, 44-46

Radio Station W.O.W., Inc. v. *Homer H. Johnson*, 89 L.Ed. 2092, 326 U.S. 120 3

Royal Neighbors of America v. *Fletcher*, (Tex. Civ. App.) 30 S.W. 478 29

Southern Pacific Ry. Co. v. *Ulmer*, (Tex. Civ. App.) 282 S.W. 305 29

Townsend v. *Sain*, 372 U.S. 293, 9 L.Ed.2d 770, 83 S.Ct. 745 48

United States v. *Denver Ry. Co.*, 191 U.S. 84, 24 S.Ct. 33, 48 L.Ed. 106 29

U. S. v. *Dillman*, 146 F.2d 572, certiorari denied 65 S.Ct. 1409, 325 U.S. 870, 89 L.Ed. 1989 48

WJR, The Goodwill Station v. *Federal Communications Commission*, 174 F.2d 226, 84 U.S. App. D.C. 1, reversed 69 S.Ct. 1096, 337 U.S. 265, 93 L.Ed. 1353 47

CONSTITUTIONAL PROVISIONS, RULES AND STATUTES

Fifth Amendment, Constitution of the United States 47

Fourteenth Amendment, Constitution of the United States 4, 7, 18, 19, 20, 39, 40, 46, 47, 49, 53, 54

Rule 19, Section 1, Rules of the United States Supreme Court 17

Texas Rules of Civil Procedure—

Rule 166-A 7, 8, 19, 20

Rule 166 12

Rule 167 8

Rule 170 ..... 3, 4, 7, 8, 10, 37, 38, 40

28 U.S.C.A. 1257 ..... 2, 9

28 U.S.C. 1652 7

TEXTS

11 Am. Jur., Sec. 88, pp. 713, 715, 716 ..... 38, 39

Scott on Trusts, Sec. 462, page 3101 20

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. _____

MARION J. BELVEAL, ET AL.,
Petitioners,

vs.

SOCONY MOBIL OIL CORPORATION AND CHARLES B. ATHEY AND JACK D. HODGDEN,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS FOR THE EIGHTH SUPREME JUDICIAL DISTRICT OF TEXAS AT EL PASO, TEXAS

TO THE HONORABLE MR. JUSTICE WARREN, CHIEF JUSTICE, AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner herein, Marion Belveal, joined by all petitioners of record in this cause, pray that a writ of certiorari issue to review the final action of the El Paso Court of Civil Appeals for the Eighth Judicial District of Texas, entered on the 12th day of June, 1968, which said final

decree reversed and remanded the judgment of the District Court of Pecos County, Texas, for Petitioners, as to the minerals involved for a jury trial but the Court went further and held that the lease of Mobil was good as a matter of law and rendered judgment for Respondent Mobil as to the lease.

The opinion of the Court of Civil Appeals at El Paso is attached as Exhibit A hereto, and has been reported in 430 S.W.2d 529. The Order Overruling the Writ would be Exhibit B, the Order Overruling the Motion for Rehearing appears as Exhibit C, the Motion for Discovery appears as Exhibit D, and the Order for Discovery appears as Exhibit E..

Motion for Recall and Stay of Judgment issued as mandate appears as Exhibit EA and the Order of the Court recalling and staying judgment appears as Exhibit EF of the Appendix.

I.

JURISDICTION

The opinion of the El Paso Court of Civil Appeals was entered on June 12, 1968. The Application for Writ of Error was originally denied after review by the Supreme Court of Texas, on the 31st day of December, 1968. Rehearing of Petitioners' Application for Writ of Error was denied on March 5, 1969.

Jurisdiction to grant this Petition is sustained by Title 28, U.S.C.A., Section 1257, Sub-section 3. As shown heretofore, the Court of Civil Appeals is the highest court of a state in which a decision could be had within the meaning of 28 U.S.C.A., Section 1257. The Application for Writ of Error to the Supreme Court was refused, no reversible error, on December 31, 1968, and Motion for Rehearing of

said application was overruled on March 5, 1969. Certified copies of both orders are included in the transcript which accompanies this application.

The judgment of the El Paso court holding the lease of Mobil good is a final judgment. The judgment of the Texas Court was final since it was determined by said Court as a matter of law that petitioners were not entitled to a Summary Judgment by means of the enforcement of a constructive trust and said court finally held in open defiance of Rule 170, T.R.C.P. that the terms of the rule granting to the trial court the right to enter a default judgment against Respondent Mobil would not be enforced. The El Paso Court further held as a matter of law that a definite form of action had to be instituted in trespass to try title and that new parties who could not be affected by the litigation had to be made parties upon a retrial. These matters partake of the finality of judgment required in order for this Court to have jurisdiction.

Petitioners refer to the decision by this Court in *Radio Station W.O.W., Inc.* v. *Homer H. Johnson,* 89 L.Ed. 2092, 326 U.S. 120-135, as well as the more recent case of *Mills* v. *Alabama,* decided by this Court on May 23, 1966, 384 U.S. 214, 16 L.Ed.2d 484, 86 S.Ct. 1434.

The above cases clearly sustain the jurisdiction of this Honorable Court.

II.

QUESTIONS PRESENTED

1. Whether the Court of Civil Appeals at El Paso can hold as a matter of law that Respondent Mobil's lease is good on a Motion for Summary Judgment in a case such as this, wherein petitioners have been deprived of adequate opportunity of fully developing their case by wit-

nesses in a trial when the issues involved make such procedure the appropriate one, it being the contention of the petitioners that they have been denied due process as guaranted by the Fourteenth Amendment to the Constitution of the United States.

2. Whether Mobil can be sustained in their contention made before the Supreme Court of Texas that Mobil has fully complied with the Trial Court's Order of Discovery when the certified records of legal instruments on file in the United States District Court at Pecos reveal that after judgment had been rendered by the District Court of Pecos County, Texas, in favor of petitioners, Mobil was still refusing to return to the Federal Court the instruments by which they fraudulently acquired petitioners' property.

3. Whether the Respondent, Socony Mobil Oil Company, can refuse to comply with the order of the District Court of Pecos County, Texas, calling for production of certain valuable and material evidence in order that petitioners might fully develop their case as to the invalidity of the lease.

4. Whether a refusal by the El Paso Court to enforce the terms of Rule 170, Texas Rules of Civil Procedure, amounts to a denial of due process under the circumstances of this cause.

5. Whether the El Paso Court of Civil Appeals can permit oil companies to recover lands under the doctrine of constructive trust, whereas individuals are compelled to resort to ancient remedy of trespass to try title without violating the due process clause of the Constitution of the United States under the Fourteenth Amendment insofar as petitioners' rights under said amendment are involved.

6. Whether the Respondent in a fraud case can withdraw the records of an Honorable United States District Court under and by which they accepted the fruits of their agent Brim's fraud, knowingly, and whereby they have fraudulently taken said properties from the petitioners herein, can be sustained by a Texas Court of last resort without even a hearing when the record reveals that they were withdrawn from the Court, and that the defendant Mobil has refused to return these material records that are public records, and are under law required to be kept as a part of the permanent records of said Court.

7. Whether the Supreme Court of the United States will permit Respondent Mobil to perpetrate a fraud upon one of the District Courts over which this Court has supervision by withdrawing records and refusing to return same, these records being a portion of the records called for by the Trial Court's Order of Discovery. This is of extreme importance to Petitioners since that portion of Petitioners' property acquired by the fraud of Mobil's employee Brim acting in behalf of Mobil was thus taken from petitioners. However, the fraud of Mobil extends to all other property recovered by petitioners in the Summary Judgment entered by the District Court of Pecos County, Texas, which judgment was reversed and remanded in part for jury trial, and which judgment was rendered in favor of Respondent Mobil as to the lease.

8. Whether the El Paso Court of Civil Appeals could compel petitioners to file a suit in trespass to try title in a case wherein the pleadings and depositions conclusively demonstrate that the only proper and legal remedy of petitioners was a suit to enforce a constructive trust, and to require the Respondents to reconvey as was done in the judgment of the District Court of Pecos County, Texas.

9. Whether the El Paso Court of Civil Appeals erred in holding that the petitioners in order to recover in this type of suit has to prove title in conformity with the rules announced with reference to trespass to try title causes of action since such rules are not applicable to a suit to enforce a constructive trust.

10. Whether the El Paso Court of Civil Appeals erred in holding that it was necessary to have other parties before the Court that might be innocent purchasers for value in a case where no damage would be done to other purchasers for value without notice by the enforcement of the constructive trust here involved and by the judgment calling for a reconveyance.

11. Whether the El Paso Court of Civil Appeals could hold that the original deeds which were later by agreement of the parties abandoned and new deeds covering the same premises between the same parties were issued in lieu thereof, and in a case wherein the pleadings of petitioners ask generally that all deeds to the lands involved be canceled, could hold that the petition had to be amended and the original deeds had to be included and a new trial had before a jury before relief could be granted to petitioners.

12. Whether the El Paso Court of Civil Appeals erred in sustaining Mobil's Motion for Summary Judgment holding that Mobil's lease was good as a matter of law upon the claim that no fraud was shown in the procurement of the lease when it appears that under the power of attorney here involved, Athey did not have the power to extend the lease.

13. Whether the El Paso Court of Civil Appeals can hold that a lease is good as a matter of law in a case where the Respondent Mobil refused to comply with the orders

of discovery of the Trial Court without excuse or justification so as to deprive petitioners of a hearing upon this cause in the Court below as required by the due process clause of the Fourteenth Amendment of the Constitution of the United States which provides in part as follows:

> ". . . nor shall any state deprive any person of . . . or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

III

STATUTES, RULES AND CONSTITUTIONAL PROVISIONS INVOLVED

1. The Constitutional provision involved in this case is the Fourteenth Amendment to the Constitution of the United States reading as follows:

> "Nor shall any state deprive any person of . . . or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

2. The statutory provision involved in this case is the Rules of Decision Act, 28 U.S.C., Sec. 1652, which reads as follows:

> "The laws of the several states, except where the Constitution or treaties of the United States or acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the Courts of the United States, in cases where they apply."

3. The rules involved in this case are Rules 166-A and 170, Texas Rules of Civil Procedure as hereinafter set forth:

Rule 170, T.R.C.P. provides, in part, as follows:

"If any party or an officer or managing agent of a party refuses to obey an order made under Rule 167, the Court may make such orders in regard to the refusal as are just, and among others, the following:

"an order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, *or rendering a judgment by default against the disobedient party.*"

Rule 166-A of the Texas Rules of Civil Procedure provides as follows:

"(a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the adverse party has appeared or answered, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof."

Rule 167 of the Texas Rules of Civil Procedure provides as follows:

"Rule 167. DISCOVERY AND PRODUCTION OF DOCUMENTS AND THINGS FOR INSPECTION, COPYING OR PHOTOGRAPHING

Upon motion of any party showing good cause therefor and upon notice to all other parties, and subject to such limitations of the kind provided in Rule 186b as the court may impose, the court in which an action is pending may order any party to produce and permit the inspection and copying or photographing by or on behalf of the moving party, of any designated documents, papers (except written statements of witnesses), books, accounts, letters, photographs, objects or tangible things, not privileged, which constitute or contain evidence material to any matter in-

volved in the action and which are in his possession, custody, or control; or order any party to permit entry upon designated land or other property in his possession or control for the purpose of inspecting, measuring, surveying or photographing the property or any designated object or operation thereon which may be material to any matter involved in the action. The order shall specify the time, place and manner of making the inspection, measurement or survey and taking the copies and photographs and may prescribe such terms and conditions as are just, provided that the rights herein granted shall not extend to the written communications passing between agents or representatives or the employees of either party to the suit, or communications between any party and his agents, representatives, or their employees, where made subsequent to the occurrence or transaction upon which the suit is based, and made in connection with the prosecution, investigation or defense of such claim or the circumstances out of which same has arisen. As amended by order of March 19, 1957, effective Sept. 1, 1957."

IV.

STATEMENT OF THE MATTER INVOLVED

The Court of Civil Appeals for the Eighth Supreme District Court of Texas at El Paso, Texas, reversed the judgment of the District Court of Pecos County, Texas, for Petitioners. The opinion of the Court of Civil Appeals is reported in 430 S.W.2d 529. The Supreme Court of Texas reviewed and refused an application for writ of error, N.R.E., on December 31, 1968. (Certified copy of order appears in the record.) A Motion for Rehearing of Application was overruled March 5, 1969. (Certified copy of order appears in record.) The Court of Civil Appeals is thus the highest court of a state in which a decision can be had, within the meaning of 28 U.S.C.A., Section 1257,

as construed by the Honorable Supreme Court of the United States in:

Michigan-Wisconsin Pipe Line Co. v. *Calvert,* Tex., 74 S.Ct. 396, 347 U.S. 157, 98 L.Ed. 583, rehearing denied;

Panhandle Eastern Pipe Line Co. v. *Calvert,* 74 S.Ct. 528, 347 U.S. 931, 98 L.Ed. 1083;

Michigan-Wisconsin Pipe Line Co. v. *Calvert,* 74 S.Ct. 528, 347 U.S. 931, 98 L.Ed. 1083;

Adam v. *Saenger,* Tex., 58 S.Ct. 28, 302 U.S. 668, 82 L.Ed. 515, gr'g certiorari 101 S.W.2d 1046, rev. 58 S.Ct. 454, 303 U.S. 59, 82 L.Ed. 649, rehearing denied 58 S.Ct. 640, 303 U.S. 666, 82 L.Ed. 1123, conformed to 119 S.W.2d 687, certiorari denied *Saenger* v. *Adam,* 59 S.Ct. 832, 307 U.S. 628, 83 L.Ed. 1511.

This is a case wherein it clearly appears that Respondent Mobil refused to comply with the Trial Court's order of discovery as set out in the Appendix "C" attached to this Petition for Certiorari. It is the contention of the Petitioners here that the refusal of the El Paso Court of Civil Appeals and the Supreme Court of Texas by its action in refusing the Application for Writ of Error, effectively denied to petitioners the rights accorded under the plain and unambiguous provisions of Rule 170, T.R.C.P. as hereinabove set out, and in the alternative, that in the absence of said rule that the action of the Respondent, Mobil, in refusing to comply with the Trial Court's order of discovery deprived Petitioners of a hearing such as is required by law, and that by Mobil's refusal the petitioners have been denied due process under the Fourteenth Amendment of the Constitution of the United States.

This was a suit begun in Pecos County, Texas, and after a jury was duly impaneled, selected and sworn, it was determined that the proper motion for petitioners was

a Motion for Summary Judgment, and all parties filed Motions for Summary Judgment. Thereafter, many hearings were held over a period of a number of weeks in which the arguments of counsel for all parties were duly considered by the court, and the court after full hearing, entered a Summary Judgment on all issues in favor of Petitioners.

It is the contention of the Petitioners here that Athey as trustee for the petitioners and Brim as agent for Mobil entered into an ownership agreement and fraudulent conspiracy with one Jack Hodgden to obtain petitioners' minerals and the lease extension agreement, and we hereinafter set out briefly quotations from the record showing that it was in this manner the lease extension agreement was procured and the minerals of the petitioners fraudulently taken from them by all of the Respondents.

Mobil later entered into the act even more fully by suing Brim, their employee (who had theretofore acted in their behalf in fraudulently procuring the minerals and lease extension agreement), in the United States District Court in Pecos, Texas, and after a short hearing procured a consent decree by which Mobil obtained properties of the petitioners so fraudulently obtained by Brim.

Under Texas law, it is the purpose of the Summary Judgment Act to sever the various causes of action submitted in the pleadings, and if any cause of action entitles one of the parties to judgment then the Court is entitled to enter a Summary Judgment upon the *controlling issues involved.* This the Trial Court did.

The facts of this case plainly show as a matter of law, one, a fiduciary relationship between Athey and petitioners; two, a fraudulent concealment of the conspiracy by Athey, Hodgden and Mobil from petitioners with the

intent to obtain the extension of the lease agreement and the minerals owned by petitioners in Pecos County lands; third, there is an entire absence of any facts which would place the petitioners upon any notice that they had been defrauded; and fourth, petitioners acted well within the two-year period in filing suit after discovery of the fraud.

We respectfully submit that reasonable minds could not differ as to the above propositions under all the evidence in this case, and that hence, as a matter of law, the suit to cancel the lease and to set aside the transaction and to enforce a constructive trust in order that petitioners might recover their minerals was filed within the time required by law, and further petitioners will show that the issues of limitation or laches and no other factual issue remain calling for the intervention of a jury.

Due process has been denied petitioners in that other citizens under the circumstances disclosed here and as shown by the decision of the Supreme Court of Texas in *Courseview, Inc.* v. *Phillips Petroleum Company*, 312 S.W.2d 197, have been granted relief such as is here prayed for. No issue exists as to limitations for jury determination and petitioners are now in dire need of an accounting such as was ordered by the Supreme Court of Texas in *Courseview, supra.*

It is the position of the Petitioners that while allegations of trespass to try title were made, that other allegations seeking to impose a constructive trust on the lands in question were involved and that the Trial Court had the right to enter a Motion for Summary Judgment under Rule 166 *on any cause of action that the Trial Court thought would entitle Petitioners to a Summary Judgment and thus dispose of and render unnecessary a trial on the merits.*

In this case Petitioners should not be required to prove any superior title since Petitioners only ask to be placed in the position that Petitioners originally occupied, and to have their status quo restored since it conclusively appears that whatever title Athey and Hodgden received, they received from Petitioners.

Petitioners here detail concisely the controlling chronological events beginning with the letter received by Petitioners that was mailed by Marion Oil Company to Marion Belveal asking if Petitioners wanted to sell their lands.

In the deposition of M. C. Stickelber, (Marion Oil Company executive who started, at the suggestion of Athey and Hodgden, this fraudulent change of events) commencing on page 35, line 3, Stickelber was asked these pertinent questions:

"Q. Did you have an account in the Enid bank?
"A. No, we did not have an account.
"Q. And I presume that the vice president of that bank would know that you didn't have an account in the Enid bank?
"A. You would have to ask the vice president.
"Q. Later on there was a draft drawn and I think it's been quite clear here, but
"A. I know nothing about the $15,000.00 draft.
"Q. Don't you know that? Haven't we gone over that time and time again here?
MR. KERR: Not about the $15,000.00 draft.
"A. I didn't authorize a $15,000.00 draft.
"Q. And you didn't know anything about it, and you have never seen it? Is that right?
"A. That is correct."

And on page 37 of said deposition, the said Stickelber further testified:

"Q. You did not authorize anyone to put a deposit slip like that, 'Marion Oil Company', deposited there at the bank in Enid? You didn't make any authorization for that deposit slip, did you? (Handing the witness a piece of paper.)

"A. No, I did not."

This was offered in evidence. Stickelber on page 39 of his deposition swore as follows:

"Q. Now the first time you knew about this $15,000.00 draft that they had drawn and this deposit that they have made, purporting to have a check drawn on the Marion Oil Company, is today. Is that right?

"A. This draft that you just showed me?

"Q. Yes. That deposit.

"A. That is the first time I have seen it.

"Q. That is the first time you have heard about it?

"A. Yes."

The above evidence clearly shows that the Respondent Jack Hodgden, at the direction of the Respondent Athey, was simply using Stickelber as a front in order to deceive the Petitioners herein as to whom the true purchaser was to be.

The evidence with reference to the breach of Athey's duties as the Petitioners' trustee demonstrates conclusively and beyond cavil a positive violation of Athey's duties as such trustee as follows, from Athey's deposition:

"Q. So you say that the reason you failed to tell him that you were actually going to be the purchaser was simply because you didn't consider it any of his business?

"A. That is one of the reasons, yes.

"Q. And what is the other reason, the fact that you didn't think you could acquire the property if you did tell him?

"A. I said that did raise a question in my mind.

"Q. Well, a pretty strong one, don't you think?

"A. Well, okay, I will go along with that." (Page 45, line 24 through page 46, line 17.)

The deposition further continued:

"Q. Now, these Belveals that came in, do you recall their names?

"A. The ones that came in the bank?

"Q. Yes, sir, to get their money, their money from you.

"A. No, I don't remember which ones they were. At that time I might not have even been in the bank when they came in. I would just have to look at the drafts. I could tell you from them.

"Q. Well, did you tell any of them that you were the purchaser, the true purchaser of the land?

"A. No.

"Q. Or that Mr. Hodgden or Mr. Brim were purchasing the land?

"A. No.

"Q. Did you, at any time, tell Marion Belveal that you had entered into a purchase agreement with Mr. Brim and Mr. Hodgden on their minerals, prior to the time that they sold the minerals?

"A. No.

"Q. Yet, you had in fact, entered into such an agreement, prior to the time that their minerals were purchased, either written or oral.

"A. An understanding, if you will accept that.

"Q. Well, you knew you were going to be an owner?

"A. Yes, sir.

"Q. And you knew Mr. Brim was going to be an owner?

"A. Yes, sir, because of the way it was proportioned.

"Q. That was the only thing left open then, was the proportion in which the three of you would participate?

"A. Or, if there would be another party." (Page 71, line 23 through page 73, line 3.)

We do not cite further pages of the record, but it has been conclusively shown that Marion Belveal testified that he went to Oklahoma after receipt of the letter to see the Marion Oil Company and was then advised to see a Mr. Jack Hodgden in Tulsa. He further testified that he first saw Athey who said that he thought this looked like a good price, and that he would probably sell his interest. All of the Belveals testified that they would not have parted with the title to their land had they realized that Athey was purchasing the land and an agreement had been entered into between a representative of Socony Mobil and one Jack Hodgden by which inside information which was unquestionably of great value had been entered into.

It is further undisputed by any of the parties before this Court that the drafts and payment of the individual interests of each of the Belveals were drawn upon the Marion Oil Company at Security National Bank in Enid, Oklahoma, and further that the defendant, Charles B. Athey, was executive vice president of said Security National Bank, and in this connection Petitioners refer to the deposition of M. C. Stickelber, being the same M. C. Stickelber who wrote the letter of March 29, 1963, which deposition was taken at the request of the attorneys for the Respondents, Hodgden and Athey, commencing at page 35, line 3.

The plaintiffs' Motion for Discovery is set out as Exhibit "D". The order of the Court granting the Motion for Discovery and calling for the production of documents,

etc., is made a part of this petition and is styled Exhibit "C". The affidavit of Mobil's employee Brim is attached hereto as a part of this Petition for Certiorari and is styled Petitioners' Exhibit "I".

V.

REASONS FOR GRANTING WRIT

The Supreme Court of the United States has attempted to furnish broad guidance with reference to Rule 19, Sec. 1. The reasons enumerated are in part as follows:

> "(a) Where a state court has decided a federal question of substance not theretofore determined by this court, or has decided it in a way probably not in accord with applicable decision of this court."

> "Object of summary judgment rule is to permit either party to brush aside groundless allegations in pleadings." *Goldsmith* v. *Cathey,* Civ. App. 1960, 331 S.W.2d 358, ref. n. r. e.

The opinion of the El Paso Court of Civil Appeals and the action of the Supreme Court of Texas in refusing the Application for Writ of Error, n.r.e., is one that is most difficult to understand in view of the announcement of the Supreme Court of Texas in *Binford* v. *Snyder,* 189 S.W.2d 471, concerning the rules of law governing a constructive trust.

At pages 472-473 of the *Binford* opinion, the Supreme Court of Texas held:

> "It is a well settled general rule that if one person obtains a legal title to property not only by fraud *or* by violation of confidence of fiduciary relations, *but* in any other unconscientious manner, so that he cannot equitably retain the property which really belongs to another, equity carries out its theory of a double ownership, equitable and legal, by impress-

ing a constructive trust upon the property in favor of the one who is in good conscience entitled to it and who is considered in equity as the beneficial owner."

The Supreme Court of Texas has, by virtue of the denial of the Application for Writ of Error refused to give to petitioners the protection of this sacred rule of law, when as has heretofore been pointed out, *the respondent Athey, by judicial admission, obtained this property in an unconscientious manner by concealing from the Belveals that he was to be the real purchaser of the property and by Athey's concealing from petitioners his dealings with one representing Mobil who had a superior knowledge of the value of the property.*

The repudiation of the rule by the refusal of the Application for Writ of Error becomes even more aggravated when the opinion of the El Paso Court of Civil Appeals requires petitioners to have fact issues determined as to whether or not petitioners *can recover minerals obtained in the Federal Court suit by Mobil against Brim. This suit was brought by Mobil with full knowledge of the fraud of Athey and Brim, and of their fraudulent conspiracy to steal the property from the petitioners herein, and Mobil in that case successfully imposed a constructive trust upon the properties obtained fraudulently by their agent Brim.* For the El Paso Court of Civil Appeals and the Supreme Court of Texas to hold that Mobil can by such a device obtain petitioners' property and that petitioners must have a jury find this as a matter of fact is a flagrant and unconstitutional violation of petitioners' rights under the Fourteenth Amendment of the Constitution of the United States.

The Supreme Court of Texas has, by virtue of the refusal of the Application for Writ of Error in this case affirmed the action of the El Paso Court, holding that

Mobil's lease is good as a matter of law in a case *where the record is replete with the failure of Mobil to answer the order of discovery of the trial court which would have revealed the full fraud exercised by Mobil in the procural of the renewal of their lease, and carries the action of the El Paso Court of Civil Appeals and the Supreme Court of Texas to such unbelievable blows as to constitute a denial to petitioners of due process as guaranteed by the Fourteenth Amendment to the Constitution of the United States.*

We believe that such action should constitute an absolute reason calling for the intervention of this Honorable Court by the granting of this writ.

Under the Fourteenth Amendment sacred legal rights exist in petitioners which rights are entitled to be enforced against anyone, including a great and mighty corporation such as Mobil.

The refusal of the Honorable Supreme Court of Texas to grant the Application for Writ of Error and the opinion of the El Paso Court herein constitutes a clear repudiation of law that has many times been declared to be sacred in cases decided by this Honorable Court dealing with constructive trusts of the type here involved.

The El Paso opinion denies to petitioners herein the protection of the law accorded by the Texas summary judgment rules, to-wit: 166 (a).

The action of the Honorable Supreme Court of Texas in approving by refusal of the writ, n.r.e., *the highly unjust, harsh and unreasonable opinion of the El Paso Court of Appeals, places a great and undue legal burden upon petitioners and indeed misplaces the burden of proof when in a summary judgment proceeding such burden should rest on Mobil.* All of this constitutes a denial of due

process as guaranteed by the Fourteenth Amendment to the Constitution of the United States.

This opinion requires petitioners to retry this case in the form of a trespass action to try title suit, and in effect denies petitioners the protection of the law accorded petitioners under Rule 166 (a).

This Honorable Court and the Supreme Court of Texas has many times quoted *Scott on Trusts*, Sec. 462, page 3101, as follows:

> "Many attempts to define or describe a constructive trust would seem to be inadequate because the definition or description is too narrow in its scope and fails to include important types of constructive trusts. Thus, it is frequently said that a constructive *trust is imposed as a remedy for fraud.* Lord Westbury in speaking of the jurisdiction to enforce a constructive trust said: 'It is a jurisdiction by which a Court of Equity, proceeding on the ground of fraud, converts the party who has committed it into a trustee for the party who is injured by that fraud. But there are numerous situations in which a constructive trust is *imposed in the absence of fraud,* as for example in the case of mistake, *or in the case of profit made by a fiduciary even though he has not acted fraudulently,* or in the case of an innocent donee of property in which another has an equitable interest. It is sometimes added *that fraud may be 'constructive' as well as actual, which is merely an expression of the idea that a constructive trust may arise in the absence of fraud.*
>
> On the other hand, a constructive trust is sometimes defined to *include only situations where a person in a fiduciary position has acquired or is attempting to acquire a personal benefit from his position.* Thus, Mr. Lewis says: 'A constructive trust is raised by a Court of equity wherever a person, clothed with a

> fiduciary character, gains some personal advantage by availing himself on this situation as trustee.' It is true enough that a constructive trust arises in such a case, but it is not true that a constructive trust arises only in such a case. Judge Cardozo, speaking for the Court of Appeals of New York, has said: *'A constructive trust is then the remedial device through which preference of self is made subordinate to loyalty to others.'* This is not and undoubtedly was not intended to be a definition of a constructive trust, since it includes only those constructive trusts which arise out of an abuse of a fiduciary relation. Judge Cardozo has also said: 'A constructive trust is the *formula through which the conscience of equity finds expression.* When property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest equity converts him into a trustee.' "

This portion is clearly in line with all of the decisions dealing with our situation that has heretofore been decided by this Court or by the Supreme Court of Texas.

This Honorable Court's conscience and equity should find expression by requiring that the Summary Judgment requiring that the property illegally taken be reconveyed to petitioners be affirmed by the summary granting of the petition for certiorari and by the affirmance of the judgment of the trial court.

Petitioners had the unquestioned right to have placed in their possession instruments under which the date of the fraud could have been fixed to the satisfaction of the Court of Civil Appeals. Petitioners respectfully submit that the failure of the courts below to give us this right constitutes a refusal to give petitioners a hearing and constitutes and is a denial of due process.

This point and all other points here raised were raised in the lower courts, and will be later discussed, together

with a citation and discussion of decisions by this, the Supreme Court of the United States.

Petitioners submit that it was the express duty of Mobil under the Texas cases cited above, *to expressly instruct Brim not to deal with one party who was representing an undisclosed trust without dealing with the others in the event such conduct might result in injury to those such as the Belveals. This rule Brim, without dispute, violated by Brim's action in obtaining the lease extension agreement* without giving the other people such as the Belveals the same information.

The opinion by the Supreme Court of Texas in *Allison* v. *Harrison,* 156 S.W.2d 137, constitutes more than an abundant answer to Mobil's contentions on the question of estoppel since the *Allison opinion by the Supreme Court of Texas required full knowledge of the Belveals which they undisputedly did not have concerning any knowledge about either the conspiracy or the value of the lease that was extended without their permission or else the Belveals would not have accepted the money paid for the lease.* The Belveals have tendered into Court everything which they have been paid by Mobil for the lease. (Tr. p. 615).

The case of *National Surety Company* v. *Jackson,* 20 F.2d 644, cited by respondent before the El Paso Court, Mobil, shows very clearly that by the acceptance of benefits gained by Brim that *Mobil by such act on their part became estopped* to question Brim's authority. For instance, by Mobil's *acceptance of the fruits of Brim's fraud in the Federal Court case.* The Court, in the *Jackson* case, supra, says as follows:

> "* * * 'It is established principle of law that where a person acts for another, who accepts the fruits of his efforts, the latter must be deemed to have adopted

the methods employed, as he may not, even though innocent, receive the benefits and at the same time disclaim responsibility for the measures by which they were acquired. With the benefits of the contract he must accept the responsibilities.' 21 R.C.L. 932; *Chaffin* v. *Main Island Creek Coal Co.*, 85 W. Va. 459, 102 S.E. 291, 293, 11 A.L.R. 657; *Chicago, Mil. & St. Paul Ry.* v. *U. S.*, 244 U.S. 351, 358, 37 S. Ct. 625, 61 L. Ed. 1184."

It is quite apparent from all of the above that Mobil has ratified Brim's acts and is fully estopped from denying any want of authority for the acts that Brim performed in procuring the extension of lease agreement and in procuring Petitioners' lands for Mobil.

It is likewise apparent that the affidavits submitted in Mobil's Motion for Summary Judgment do not create any issue of fact in that they are *totally insufficient as a matter of law.*

Mobil's affidavits seem to be based upon the vague knowledge of various officers of the production department who attempt to swear generally that *they knew nothing about Brim's fraud,* whereas in truth and in fact, Brim was the only one that they placed in a position to know what Brim did with Athey and Brim made his affidavit on *his own personal knowledge as required by Rule 166A,* and the affidavits of the other parties used by Mobil are not entitled to be considered in this case, under the decision in *Box* v. *Bates,* 341 S.W.2d 219, by Judge Steakley, speaking for the Supreme Court of Texas and this decision is supported by subsequent cases of like import.

By means of *such affidavits,* Respondent Mobil *does not raise either an issue of fact or issue of law,* and therefore, we respectfully submit that this writ should be granted.

The circumstances in this case, as well as the direct evidence, certainly show fraud as a matter of law on the part of Mobil in securing the extension agreement and the lands involved without notice to the Belveals in that the evidence shows that Mobil was contemplating the drilling of two deep test wells some 17,000 feet to the Ellenberger at the time they secured the extension agreement and the lands.

We have heretofore pointed out that the amount of money that was paid for the lease and the question of whether or not the money paid was adequate is not material under the *Allison* case, supra, by the Supreme Court of Texas and the other cases cited therein.

Certainly, the Belveals did not know that Brim was working in a conspiracy with Athey and Hodgden to obtain the property here involved, as well as the lease extension agreement. With such knowledge the Belveals would not have accepted this amount of money for the lease extension agreement or for the land involved herein. This is made clear by the affidavits of Petitioners.

It is quite obvious that the Power of Attorney having been made in August, 1960, *that when Brim said he went up and discussed, at the instructions of Mobil, with Athey the question of getting a Power of Attorney from the Belveals and Athey, that Brim had to be mistaken as to the year he did so and that the year of 1959 or 1960, as shown by the deposition testimony of Brim and the other undisputed circumstances in evidence, was the time when Brim actually advised Athey to get the Power of Attorney and was the time when Brim advised Athey of the value of said properties.* Certainly, Brim had to give Athey the information sworn to in Brim's affidavit or else Athey would not have called the meeting together.

This fact as to Athey's calling this meeting after a conference with Brim is undisputed in this record.

The entire remaining portion of the affidavit and the deposition of Brim shows this to be true and Petitioners respectfully submit that reasonable minds cannot differ as to this point.

The decisions dealing with summary judgments are clearly summarized by the Supreme Court of Texas in *Alexander* v. *Bank of America National Trust and Savings Assn.*, 401 S.W.2d 688, and they all require that the testimony of the Belveals under the undisputed facts appearing from the depositions and affidavits on file in this cause be accepted in that it is *clear, direct and positive and there are no circumstances in evidence tending to discredit or impeach the material portion of such testimony. Cochran v. Wool Growers Storage*, 160 S.W.2d 904.

Mobil had the opportunity to prove which date was correct—1958, 1959 or 1960 or, 1961—but the *remainder of the facts when placed together show that it had to be earlier than the date the Power of Attorney was actually procured because Brim swore that was what he went up there to get, the Power of Attorney, at the request and instruction of Mobil.*

Very frankly, Brim is a party in this case. In fact, he is a defendant. The only reason that judgment is not rendered against Brim is because *Mobil took away all of the property that he acquired as a result of the fraudulent conspiracy.*

The exceptions discussed above become peculiarly important in a case such as this. *Mobil had the means and opportunity of disproving the testimony if it is not true and failed to do so.*

There is no ground for impeaching Brim's testimony as to the date since *Brim's deposition testimony shows that he did not know whether it was 1958, 1959 or 1960 when he began having these communications with Athey.*

Judge Greenhill of the Texas Supreme Court again with clarity reviewed the decisions with reference to summary judgment in *Great American Reserve Insurance Company* v. *San Antonio Plumbing Supply Co.*, 391 S.W.2d 41. On page 46 of the opinion the following appears:

> "This is a summary judgment case; and in answering the above question, we must follow certain rules laid down by this Court, Rule 166-A, Texas Rules of Civil Procedure, provides that summary judgment shall be rendered if it is shown that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. The burden of proof is on the movant, and all doubts as to the existence of a genuine issue as to a material fact are resolved against him. *Tigner* v. *First Nat'l Bank*, 153 Tex. 69, 264 S.W. 2d 85 (1954); *Gulbenkian* v. *Penn*, 151 Tex. 412, 252 S.W. 2d 929 (1952). In other words, the evidence must be viewed in the light most favorable to the party opposing the motion. *Valley Stockyards Co.* v. *Kinsel*, 369 S.W. 2d 19. (Tex. Sup. 1963); *Smith* v. *Bolin*, 153 Tex. 486, 271 S.W. 2d 93 (1954). If the motion involves the credibility of affiants or deponents, or the weight of the showings or a mere ground of inference, the motion should not be granted. All conflicts in the evidence are disregarded, and the evidence which tends to support the position of the party opposing the motion is accepted as true. *Cowden* v. *Bell*, 157 Tex. 44, 300 S.W. 2d (1957); *Smith* v. *Bolin*, supra; *Gulbenkian* v. *Penn*, supra. Evidence which favors the movant's position is not considered unless it is uncontradicted. If such uncontradicted evidence is from an interested witness, it cannot be considered as doing more than raising an issue of fact, unless it is clear, direct and

positive and there are no circumstances in evidence tending to discredit or impeach such testimony. *Cochran* v. *Woolgrowers Central Storage Co.*, 140 Tex. 184, 166 S.W. 2d 904 (1943). This exception is especially true where the opposite party has the means and opportunity of disproving the testimony, if it is not true, and fails to do so. *Valley Stockyards Co.* v. *Kinsel*, supra; *James T. Taylor & Son, Inc.* v. *Arlington Ind. School Dist.*, 160 Tex. 617, 335 S.W. 2d 371 (1960); *Owen Dev. Co.* v. *Calvert*, 157 Tex. 212, 302 S.W. 2d 640 at 642 * * *."

In connection with the above, had Mobil presented the agreement called for by the order of the Court (Tr. p. 326) between Mobil and Sun Oil Company providing that Mobil would drill a deep well in the Coyanosa area concerning Section 47, Block OW, Pecos County, Texas; had they presented the letter dated March 22, 1961 pertaining to such agreement that is called for in the Trial Court's Discovery Order; had they presented the papers, documents and things that were produced at exploration conference meetings attended by J. K. Brim, Jr. as to letters, papers, memoranda, documents, maps, surface maps, ownership maps, geophysical maps, geological maps, geophysical information, geological information, reports, opinions and analyses; had Mobil produced the men who attended these meetings with Brim and had Mobil produced this testimony that was called for by the Court's order then there could be no question as to the exact date when Brim was instructed to get the Power of Attorney from Charles B. Athey and there could be no doubt as to the exact date when according to the affidavit of Brim the properties appeared to have great potential for oil and gas production insofar as Mobil's knowledge was concerned.

There could be no doubt if Mobil had shown the oil maps and geophysical structure maps showing the proba-

ble value of same." However, the fact that the date in Brim's affidavit must be regarded by the Court as erroneous is not material when all of the other facts are considered. This contention finds abundant support in this portion of Brim's affidavit fixing the date wherein he said he was instructed to try to get the said Athey to procure a Power of Attorney from all parties so that they could get an extension of a lease involving said property that was about to expire. "I, acting solely as the agent for Mobil and for no one else and not for myself, did contact the said Charles B. Athey and convey to him the information that the property appeared to have great potential as oil and gas producing property, that a well was to be drilled to the Ellenberger and that it would be wise for him to secure a Power of Attorney so that he could represent the other parties, including the Belveals and in order that he might renew and execute leases and I then advised him that a well was to be drilled to the Ellenberger on adjacent property and that said property appeared to be valuable. He advised me that he would contact the various owners for the purpose of getting the Power of Attorney from the Belveals and others and thereafter, he did procure a Power of Attorney and executed an extension of said lease." (Tr., pp. 1250-1251). The word *thereafter* demonstrates that the date *was prior to the time the extension of lease was procured. The fact that all of this was done prior to securing the lease extension is material and controlling and there can be no doubt as to this.*

Therefore, this evidence must stand as conclusive *not as simply raising a fact for the jury* on this issue, but as a *matter of law* since under the decisions by the Supreme Court of Texas as hereinabove set out the failure of Mobil to offer such evidence in the face of the affidavit made

may be considered as strong corroboration of the fact that it was made *prior to the date the lease extension agreement was procured* in that it is undisputed and it would be ridiculous to give the affidavit the construction that Brim would be asking Athey to *get a Power of Attorney in 1961 when the Power of Attorney was procured in 1960 and necessarily it was procured prior to the lease extension agreement.* This is shown conclusively. Reasonable minds cannot differ as to this. The El Paso Court was under a duty to take these material facts into consideration in a determination as to the time when such information was furnished as shown by these cases. *Southern Pacific Ry. Co.* v. *Ulmer,* (Tex. Civ. App.) 282 S.W. 305; *Pullman Co.* v. *Nelson,* 22 Tex. Civ. App. 223, 54 S.W. 624; *Royal Neighbors of America* v. *Fletcher,* (Tex. Civ. App.) 30 S.W. 478; *United States* v. *Denver Ry. Co.,* 191 U.S. 84, 24 S.Ct. 33, 48 L.Ed. 106.

In other words, *the date of 1961 is absolutely incompatible and does not make sense with the remaining portion of the affidavit or the deposition and other situations and circumstances in evidence by deposition,* affidavits, etc. in this case.

Whatever the date, it is obvious that Mobil unquestionably then knew about the property and wanted it badly, both at the time of lease extension agreement as well as at the time of the purchase of the Belveals' interest in the lands involved.

It is obvious that Mobil instructed Brim to commit this fraud, else why should their attorneys *risk contempt of court proceedings rather than comply with the Court order to produce these material instruments that would have answered this question.*

Having so failed to answer except through the hearsay affidavits of Tom Sealy and others, all of which affidavits the plaintiffs-appellees made proper motion to strike, Mobil is in no position to now make the contention that there was no proof that this happened after securing the lease extension agreement.

As said by the Waco, Texas Court of Civil Appeals in *Alexander* v. *Bank of America National Trust and Savings Association*, 401 S.W.2d 688:

> "It is impossible for us to decide from that incomplete record that the judgment was erroneous. *Torrey* v. *Cameron*, 74 Tex., 187, 11 S.W. 1088. It is presumed the omitted deposition established its propriety. *Armstrong* v. *West Texas Rig Company*, Tex. Civ. App., 339 S.W. 2d 69, 73, writ ref. n.r.e.; Locke v. J. H. Marks Trucking Co., Tex.Civ.App., 318 S.W. 2d 1; *Stovall* v. *Scofield*, Tex. Civ. App., 325 S.W. 2d 221; *McFarland* v. *Connally*, Tex.Civ.App., 252 S.W. 2d 486, 488."

The Trial Court had the right in determining whether this transaction occurred prior to 1960 and prior to the lease extension agreement based upon all the affidavits, depositions and unimpeached and uncontradicted testimony in this case to consider all of these circumstances. This points clearly to the error of the Court of Civil Appeals in holding that the fraud occurred long after the lease was procured.

Mobil did not file relevant, material and admissible affidavits and hence, it is now beyond Mobil's power to claim that any of these matters *would have established a date in their favor.*

The above cases establish a strong case for the Petitioners, one that was conclusive, and that was never in any way rebutted by any evidence of the Respondents.

Mobil, having chosen to take this attitude rather than to obey the mandate and order of discovery of the trial court when Mobil could have done so, is now estopped from claiming that the information was not known to Mobil prior to the date of the lease extension agreement.

It is quite obvious that the leases dealing with the Sun Oil Company agreement would have been most enlightening, as well as all the other important information sought and such information would have established that the date of Mobil's knowledge was prior to the lease extension agreement and would have corroborated Brim's testimony and affidavit.

It is submitted by Petitioners that this is the reason that the attorneys for Mobil *risked contempt of Court rather than produce the evidence.*

As we have heretofore pointed out, *by Federal Court order* Petitioners procured one of the contracts with Humble which showed that for 50% of the proceeds Mobil was willing to put up all of the money and expense necessary to drill 17,000 feet to the Ellenberger in the early part of March, 1961.

Mobil's agreement appears to have been entered into on June 27, 1961 (Tr. 922). It was Exhibit No. 31 and is one of the exhibits that Mobil has thus far refused to produce. The Humble agreement is Exhibit No. 31, but Mr. Browder, of counsel for Mobil, told the Court that he would prefer not to introduce the exhibit into evidence. This is plainly shown on page 923 of the Transcript.

Why, we might ask this Honorable Court, was counsel for Mobil unwilling to make this exhibit a matter of public record? Exhibit No. 31, by Court order, is now a part of the record in this cause.

The entire pattern of conspiracy and fraud as between all of the respondents is now clear. It is a matter upon which we respectfully submit reasonable minds, as to the material and controlling facts, cannot differ. Hence, this was not a case for a jury since any finding made would of necessity have been set aside notwithstanding the verdict of a jury by the Trial Court since such findings would have been without any evidence of probative force to sustain them.

We respectfully submit that the only reason counsel for Respondent, Mobil, had in mind in not wanting to make the exhibit a matter of record, and *the only reason that Mobil had for withdrawing the federal court records under an oral agreement and the only reason Respondent Mobil now has for contesting the production and return of the records to the Federal Court and the only reason Mobil has for refusing and failing to comply with the Trial Court's order of discovery in this case is that Mobil knows that these instruments will show that this* conspiracy was entered into by Brim and master-minded by Mobil in order that Brim might do for Mobil the very things he was trained to do and that was to acquire valuable property and leases and these instruments show conclusively that the fraud begins prior to the time when the Power of Attorney and the lease extension agreement was procured.

An innocent purchaser for value does not hide public records or documents or behave in such a manner as have all Respondents, and when the cases are considered by this Honorable Court that we have herein cited, justice calls for the granting of this writ.

To go a little further, we do not believe that reasonable minds could differ that Athey and Hodgden knew nothing about the wells that were to be drilled until they

were so informed by Brim, Mobil's agent. What circumstances are there in record from the testimony of anyone that would indicate that they received any information of value of material importance except from Brim.

If this opinion stands, we have reached the age in our jurisdiction *that Courts can act without either reason or explanation by placing their judicial stamp of approval or brand upon this kind of fraud* without any opportunity being afforded petitioners to fully develop the evidence and to cross-examine and examine the witnesses.

What interest would Athey and Hodgden have had or what could have prompted them to get the meeting together whereby Athey could deliver his sales pitch and procure the Power of Attorney to represent all of the people involved herein, including the Belveals, had it not been as Brim's deposition and affidavit show, that Brim was instructed by Mobil to have Athey call this meeting for the purpose of obtaining this Power of Attorney?

Further (when the evidence of Marion Belveal, who was acting for the other Petitioners, is considered), does it not appear without dispute that Athey told the Belveals and all others as the basis of talking them into giving Athey a Power of Attorney in the meeting called by Athey *that he would keep the Belveals informed as to wells drilled or about to be drilled in the vicinity of their property that might affect the value of the Belveal lands or any deals that might interest them in the counties including Pecos County that was covered by the Power of Attorney?* (Tr., p. 1193).

Again, it is shown by the affidavit of Marion Belveal who was acting as the agent for all of the appellees, and this appears without dispute, *that he did not expect Athey to make an extension of lease or renewal of any lease. Cer-*

tainly the Power of Attorney did not give Athey the power to determine the price to be received for the lease.

What evidence is there in this record that disputes this testimony? This, the Court of Civil Appeals failed to supply in its opinion, and nothing was added by the blanket denial without any written opinion of the Supreme Court of Texas when that court denied the application of petitioners for writ of error.

It is quite obvious that the extension agreement was to the advantage of Mobil since they would have spent at least $1,200,000.00 to drill a well in order to hold the lease without getting an extension.

In the lower court we asked Respondent Mobil and the Court of Civil Appeals and Supreme Court of Texas to tell *us under the record in this case how reasonable minds could differ upon the proposition that it was easier for Brim, acting in Mobil's behalf to sell one man who had a Power of Attorney, than it was to sell all of the others in spite of the fact that it was the nondelegable duty of Mobil to see that Brim's information was not used to harm the others, including the Belveals* since Mobil knew from the very start of Brim's contact with Athey that Athey occupied a fiduciary relationship toward the Belveals.

We further respectfully submit that reasonable minds could not differ upon the proposition that Brim *was acting solely for Mobil even under the contentions of Mobil up until the early part of 1962 at a time prior to the time that Brim entered into the ownership agreement with the other appellants in 1962.*

We further respectfully submit that reasonable minds could not differ when the material facts are considered upon the fact that Mobil first wanted the extension agreement

and needed time to make deals with Sun and Humble which they were apparently engaged in making for many months prior to March, 1961, at which time a letter exhibit to Sun Oil was introduced into evidence (then withdrawn) from the Federal Court case before Mobil would want to either drill a well or before they would want to purchase the Belveal interest. It is a matter of which this Court should take judicial knowledge that this is the manner in which purchasers and developers of oil property such as Mobil and all others operate.

Mobil was concerned with *getting as much from everybody as they could* based on their geological information as to the great value of these properties and it required time and months of dealing for Mobil to do this.

The Respondents' argument in the court below that they have been harmed by the failure of the Belveals to discover their fraud with respect to the lease agreement falls by the wayside since such a claim is preposterous and no attempt has been made to create such a claim, save by the general affidavits of Mobil that they have spent millions for improvements. We therefore respectfully submit that Mobil is liable as a joint conspirator with Athey and Hodgden in procuring the Petitioners' property by fraud since no one, save Mobil, under evidence in this case, who had knowledge of this information, could have set this chain of fraudulent acts into motion, finally culminating in the disaster to the Petitioners of which complaint is here made.

The undisputed circumstances in this record demonstrate that it is true that Mobil could have begun drilling operations but before doing so Mobil wanted to get control of more acreage which Sun and Humble had in their possession and the argument that had Mobil done so the Belveals would have been $72,423.21 poorer *does not make sense.*

since had the Belveals not executed the extension of lease agreement, they would have been millions of dollars richer without the expense and bother of this lawsuit either to them or to this Court.

Likewise, when the statement is made on page 25 of the Brief filed in the court below that Mobil gained nothing, save a two-year lease, Mobil by this act *gained all of the time necessary to acquire this other acreage and made millions as a result of their drilling during the period of this extension* which they made with Sun and Humble.

The advantakes to Mobil are clearly evident as a matter of common, as well as judicial, knowledge.

This Court can surely see through this kind of reasoning. The reasoning of Mobil in this connection, on p. 28 of their Brief, as filed in the El Paso Court, *challenges common sense and all of the facts in this record* and certainly should not have been taken as being true by the Trial Court or by this Court in that the record on its face conclusively shows the contrary in such a manner that reasonable minds could not differ as to its effect.

It is shown by Brim's deposition that he was division staff landman for Mobil from January 1, 1960 to February 1, 1963 (p. 8, line 16 to p. 10, line 7 of Brim's deposition), and that he was supposed to keep abreast of the latest developments and acquisitions of competitors in the oil industry and to interpret the significance of those developments as related to Mobil Oil Company and during this time counsel with the division land man in the evaluation of land acquisition proposals. (Tr. 1071) (Brim's deposition, p. 10, line 23 to p. 11, line 9). On deposition, Brim further testified that at these conferences during this period of time that the related activities referred to things concerning exploration matters, as shown by his testimony heretofore quoted.

Brim expressly admitted that *he first met Athey in 1958.* (Tr. 1078-1079, heretofore quoted)

All of these facts when considered together show *that it was prior to the lease extension agreement that Brim furnished this information to Athey.* Reasonable minds cannot differ in this regard, and hence, the Motion for Summary Judgment was correctly entered and there was nothing for the jury to decide. A verdict to the contrary by a jury would of necessity be set aside on a motion for judgment notwithstanding the verdict.

Petitioners believe that they have met the burden imposed on Petitioners by law to show by specific records that there was fraud and unlawful conspiracy in the negotiating, signing and delivering and in the payment of the May, 1961, extension of lease agreement and we will go further and say that Petitioners have shown fraud coming from the headquarters of Mobil in their instructions to Brim to procure the Power of Attorney by which the fraud could be committed, notwithstanding the evasive opinion of the El Paso Court and the general statement in the opinion of the Court that Petitioners failed in their proof as a matter of law.

It is extremely important that this Honorable Court read the Order of Discovery as prepared by the Trial Court and as reflected by the transcript, page 326. This order of discovery has been attached to this Petition and appears as Appendix "C".

We respectfully submit that after this is done that it will be readily apparent that Mobil's refusal to comply with the Trial Court's order of discovery fully justified the trial court in entering a default judgment as to Mobil under the terms of Rule 170, T.R.C.P., both as to the minerals and as to the lease.

Of what importance are sacred statutes if our Texas Courts refuse to give them life and meaning by judicial enforcement and observance?

Rule 170, T.R.C.P. is not to be ignored by the whims and caprices of the attorneys for Mobil, or by Mobil itself.

Rule 170 is a sacred rule dealing with the ability of our courts to enforce orders involving discovery and the opportunity of litigants in courts to examine the evidence of the adversary and a failure to give this rule effect by action of the Supreme Court of Texas in denying the Application for Writ of Error, n.r.e. in this cause constitutes a denial of due process of law. This clearly calls for the intervention of this Court if justice under law is to remain upon the earth.

The importance of Constitutional Law and the Fourteenth Amendment which we ask this Honorable Court to enforce is well stated in *11 Am. Jur.*, p. 713, Sec. 88, as follows:

> "Since the Constitution is intended for the observance of the judiciary as well as the other departments of government and the judges are sworn to support its provisions, *the courts are not at liberty to overlook or disregard its commands. It is their duty in authorized proceedings to give effect to the existing Constitution and to obey all constitutional provisions irrespective of their opinion as to the wisdom of such provisions.*"

11 American Jurisprudence eloquently proclaims on page 715 as follows:

> "Consequently *state courts*, as well as Federal courts, are under an obligation to guard and *enforce every right secured by the Federal Constitution;* and *it is the duty of the state courts as much as of the Federal courts*, when the question of the validity of a state statute is necessarily involved as being in alleged

violation of any provision of the Federal Constitution, to decide that question and hold the law void if it violates that instrument."

Again in the same volume, the text in commenting upon this power as being essential to protection of liberty which necessarily carries with it the protection of property rights states as follows, on page 716:

> "The principle in the government of England that the Parliament is omnipotent does not prevail in the United States, and every law in this country must conform, in the first place, to the Constitution of the United States, then to the Constitution of its particular state, and so far as it is an infraction of either, it is void. The principle which thus permits the courts to pronounce an act of the legislature null and void, because it conflicts with the provisions of the Constitution, seems to be peculiar to American institutions and has been declared to be one of the strongest barriers ever devised *against the tyrannies of political assemblies.* The Supreme Court has declared that it is the duty of courts to be watchful for the *constitutional rights of the citizens and against any stealthy encroachments thereon.* Their motto should be obsta principiis. The perpetuity of our institutions and the liberty which is enjoyed under them depend in no small degree upon the power given the judiciary to declare null and void all legislation clearly repugnant to the supreme law of the land.
>
> It has been said that the judiciary should *protect the rights of the people with great care and jealousy,* not only because this is its duty, but also because in times of great popular excitement *it is usually their last resort.*"

If an amendment or constitutional provision or statute or rule violates the Fourteenth Amendment, then it is the duty of this Supreme Court of the United States to declare such a provision void.

It necessarily follows by logical analogy that in a case such as this that wherein the 14th Amendment gives to the petitioners sacred legal rights which have been unquestionably disregarded by the opinion of the El Paso Court of Civil Appeals and the Supreme Court of Texas that this Court should act to protect petitioners' constitutional rights.

Petitioners have heretofore demonstrated that the Motion for Discovery as signed by the Trial Court and as made by the Petitioners' attorney was calculated to lead to the discovery of the date of the inception of fraud of Mobil in procuring the lease.

Mobil, without justification, refused to comply with the Trial Court's orders. The petitioners were entitled upon such a failure to have the Trial Court enter under the express terms of Rule 170, T.R.C.P. a default judgment against Mobil.

This rule has been wholly ignored, *and Mobil was well aware of the penalty for their disobedience of the Trial Court's order.*

Petitioners cannot understand under what theory Mobil can claim or any Court can hold that Mobil's lease under such circumstances is valid as a matter of law or otherwise.

It has been appropriately held by the Supreme Court of the United States in the fairly recent case of *Armstrong v. Manzo*, 380 U.S. 545, 14 L.Ed.2d 62, a decision wherein a District Court Judgment had been affirmed setting aside an adoption decree by the El Paso Court of Civil Appeals, 371 S.W.2d 407, and thereafter, by the Supreme Court of Texas by the refusal of an application for writ of error in substance that a fundamental requirement of due process is the opportunity to be heard.

This Court further held that an opportunity for a hearing such as is required by due process must be granted at a meaningful time and in a meaningful manner. To use the words of Mr. Justice Stewart, we quote from the opinion on page 65, as follows:

> "In disposing of the first issue, there is no occasion to linger long. It is clear that failure to give the petitioner notice of the pending adoption proceedings violated the most rudimentary demands of due process of law. 'Many controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case.' *Mullane* v. *Central Hanover Tr. Co.*, 339 U.S. 306, at 313, 94 L ed 865, at 872, 70 S. Ct. 652. 'An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. *Milliken* v. *Meyer*, 311 US 457 (85 L ed 278, 61 S Ct 339, 132 ALR 1357); *Grannis* v. *Ordean*, 234 US 385 (58 L ed 1363, 34 S Ct 779); *Priest* v. *Las Vegas*, 232 US 604 (58 L ed 751, 34 S Ct 443); *Roller* v. *Holly*, 176 US 398 (44 L ed 520, 20 S Ct 410) . . .' Id, at 314, 94 L ed at 873. Questions frequently arise as to the adequacy of a particular form of notice in a particular case. See, e.g., *Schroeder* v. *City of New York*, 371 US 208, 9 L ed 2d 255, 83 S Ct 279, 89 ALR 2d 1398; *New York* v. *New York, N.H. & H.R. Co.* 344 US 293, 97 L ed 333, 73 S Ct 299; *Walker* v. *Hutchinson City*, 352 US 112, 1 L ed 2d 178, 77 S Ct 200; *Mullane* v. *Central Hanover Tr. Co.*, supra. But as to the basic requirement of notice itself there can be no doubt, where, as here, the result of the judicial proceeding was permanently to deprive a legitimate parent of all that parenthood implies. Cf. *May* v. *Anderson*, 345 US 528, 533, 97 L ed 1221, 1226, 73 S Ct 840."

The Court further states with clear emphasis:

> "Had the petitioner been given the timely notice which the Constitution requires, the Manzos, as the moving parties, would have had the burden of proving their case as against whatever defenses the petitioner might have interposed. See *Jones* v. *Willson,* 285 S.W. 2d 877; *Ex Parte Payne,* 301 S.W. 2d 194. It would have been incumbent upon them to show not only that Salvatore Manzo met all the requisites of an adoptive parent under Texas law, but also to prove why the petitioner's consent to the adoption was not required. Had either side offered any evidence, those who initiated the adoption proceedings could not have prevailed.
>
> "Instead, the petitioner was faced on his first appearance in the courtroom with the task of overcoming an adverse decree entered by one judge, based upon a finding of non-support made by another judge. As the record shows, there was placed upon the petitioner the burden of affirmatively showing that he had contributed to the support of his daughter to the limit of his financial ability over the period involved. The burdens thus placed upon the petitioner were real, not purely theoretical. For 'it is plain that where the burden of proof lies may be decisive of the outcome.' *Speiser* v. *Randall,* 357 US 513, 525. 2 L ed 2d 1460, 1472, 78 S Ct 1332. Yet these burdens would not have been imposed upon him had he been given timely notice in accord with the Constitution.
>
> "A fundamental requirement of due process is 'the opportunity to be heard.' *Grannis* v. *Ordean,* 234 US 385, 394, 58 L ed 1363, 1369, 34 S Ct 779. It is an opportunity which must be granted at a meaningful time and in a meaningful manner. The trial court could have fully accorded this right to the petitioner only by granting his motion to set aside the decree and consider the case anew. Only that would have wiped the slate clean. Only that would have restored the petitioner to the position he would have occupied had due process of law been accorded to him in the first place. His motion should have been granted."

It is quite apparent from the reading of the above case that had the Order of Discovery been complied with Petitioners could have shown to the satisfaction of the Court or at least raise a jury issue as to when the fraud first began by which Mobil fraudulently procured the lease.

Considering the affidavit of Brim which is before this Court, and which we again ask this Court to read, it is quite apparent that this fraud began prior to the time that Athey procured his Power of Attorney, and was in existence at the time that Mobil fraudulently procured its lease.

The question as to when Mobil discovered the value of the lease and when they begin plans to secure and acquire the properties of Petitioners through Athey could likewise have been shown had the Order of the Trial Court for Discovery been complied with.

This Supreme Court of Texas has affirmed the Court of Civil Appeals' opinion contrary to the right of the Petitioners to have a *full development of the evidence as required by the rules of discovery and said court and the El Paso Court has placed the burden of proof upon petitioners which should have been placed upon Mobil in a summary judgment proceeding.* Again this is a denial of due process calling for the granting of this writ and summary affirmance of the trial court's judgment.

This is by analogy the clear import of the *Manzo* case, supra.

Due process and the rules of discovery, under such circumstances, become meaningless if Petitioners are not given an opportunity to develop the truth.

The decision in *Radic* v. *Fullilove,* 198 F. Supp. 162 is likewise clearly in point upon this question of petitioners' right to examine the documents called for in the Order of Discovery and to have returned and filed in the Federal

Court the documents by which Mobil acquired petitioners' property in order that any semblance of a judicial trial in accordance with the rules might have been had. We quote from the *Radic* case, supra, at page 164 as follows:

> "The question before this Court is whether plaintiff was accorded procedural due process, that is, whether the procedure was essentially fair (*Cakmar* v. *Hoy*, 9 Cir., 265 F. 2d 59; *United States ex rel. Dolenz* v. *Shaughnessy*, 2 Cir., 200 F. 2d 288; *Chao-Ling Wang* v. *Pilliod*, 7 Cir., 285 F 2d 517.
>
> "There is no doubt from the record in this case that plaintiff was allowed a full and fair opportunity to put forward his evidence proving, or tending to prove, that he would be subject to physical persecution if sent to Yugoslavia. However, the evidence to the contrary which was apparently considered by the Commissioner in his final determination, was submitted in a file which plaintiff was not even permitted to see. No opportunity was given plaintiff to explain, rebut, contradict or impeach the documents in question. No contention is made that the documents in the file were confidential because their disclosure would be harmful to the security or safety of the United States. Under these circumstances, this case does not come within the scope of the ruling in *Jay* v. *Boyd*, 351 U.S. 345, 76 S Ct 919, 100 L. Ed. 1242. No attempt had been made to show that the file upon which the Federal officials relied here in reaching their decision was kept outside the record under any circumstances which made such action reasonable. To the contrary it appears that defendant arbitrarily and capriciously drew a cloak of secrecy around such evidence as is claimed to be contrary to plaintiff's contentions. And this was done without offering any reason or rational explanation for the refusal to disclose the evidence which patently was the very basis for the denial of plaintiff's application. For all that appears in the record now before the Court this vital file could have been made up of clippings from magazines and newspapers of gen-

eral circulation in the United States. The United States Supreme Court expressly pointed out that no such situation existed in *Jay* v. *Boyd*, supra. (See: 351 US 358, 76 S. Ct. 927). It was clearly shown in that case that certain particular information was kept confidential because its disclosure would have been prejudicial to the public interest, safety or security.

"From the record before me in this case, it is patent that plaintiff has not been afforded procedural due process here. Under our form of Government, the right to a hearing embraces not only the right to present evidence in support of one's position, but also a reasonable opportunity to know the claims of the opposing party with the privilege of seeking to refute those claims. The right to be heard and the right to contest opposing evidence are equal and coexisting rights, and both are essential to procedural due process (*Morgan* v. *United States*, 304 U.S. 1, 58 S. Ct. 773, 82 L. Ed. 1129. The right to contest the opposing evidence was nullified in the instant case by the refusal to plaintiff of an opportunity to inspect the documents in the file which had been considered by the administrative agents. This right was, in my opinion, inviolate in the absence of a showing that the disclosure of those documents would be harmful to the security or well being of the United States of America (See: *Boudin* v. *Dulles*, 98 U.S. App. D.C. 305 235 F 2d 532 and *Dulles* v. *Nathan*, 96 U. S. App. D.C. 190, 25 F. 2d 29.)

"We have for a guide in this field the case of *Parker* v. *Lester*, 9 Cir., 227 F.2d 708. In that case were six seamen, all American citizens. It appeared that if plaintiffs were erroneously granted the documents they sought, there would be a danger that in time of war the United States might suffer disastrous losses as a result of the intentional blowing up of munitions vessels in American harbors. Less spectacular sabotage of the Merchant Marine might also take place. On the other hand, it appears that if the documents were erroneously denied, the plaintiff seamen would be deprived of the opportunity to work in the particular

calling of their choice without good reason. Judge Murphy, in the lower Court (See: D.C., 112 F. Supp. 433), allowed the sources of certain information to be kept confidential, holding that otherwise practically all of the sources of information of the F.B.I. and other Federal security agencies would be dried up. His decision was reversed, and it was held that as a matter of procedural due process the plaintiff seamen were entitled to confrontation and cross-examination of confidential informants (*Parker* v. *Lester,* supra)."

In *Hart* v. *Johnson,* 389 F.2d 239 (1968), the court stated:

> "In S. J. Groves & Sons v. Ohio Turnpike Commission, 315 F.2d 235, 237 (6th Cir. 1963), cert. den., 375 U.S. 824, 84 S.Ct. 65, 11 L.Ed.2d 57 we said:
>
> > 'This Court has on several occasions expressed the view that a trial judge should be slow in disposing of a case of any complexity on a motion for summary judgment, that while such a judgment wisely used is a praiseworthy and timesaving device, yet such prompt dispatch of judicial business is neither the sole nor the primary purpose for which courts have been established, and that a party should not be deprived of an adequate opportunity to fully develop his case by witnesses and a trial, when the issues involved make such procedure the appropriate one. Knapp v. Kinsey, 249 F.2d 797, 801-803, C.A. 6th; Bohn Aluminum & Brass Corp. v. Storm King Corp., 303 F.2d 425, 427, C.A. 6th; Begnaud v. White, 170 F.2d 323, 327, C.A. 6th; Estepp v. Norfolk & W. Ry. Co., 192 F.2d 889, C.A. 6th; Bellak v. United Home Life Ins. Co., 211 F.2d 280, 283, C.A. 6th; Hoy v. Progress Pattern Co., 217 F.2d 701, 704, C.A. 6th. See: Sartor v. Arkansas Natural Gas Corp., 321 U.S. 620, 64 S.Ct. 724, 88 L.Ed. 967; White Motor Co. v. United States, 372 U.S. 253, 83 S.Ct. 696, 9 L.Ed.2d 738.' "

A fundamental requisite of due process of law is the opportunity to be heard. U.S.C.A. Const. Amend. 14.

Mullane v. *Central Hanover Bank & Trust Co.*, 70 S.Ct. 652, 339 U.S. 306, 94 L.Ed. 865. *Pierce* v. *Hildebrand*, 103 F.Supp. 396.

A person's rights to reasonable notice of a charge against him and an opportunity to be heard in his defense are basic, and such rights include, as a minimum, a right to examine witnesses against him, to offer testimony and to be represented by counsel. U.S.C.A., Const. Amend. 14. *In re Oliver*, 68 S.Ct. 499, 333 U.S. 257, 92 L.Ed. 682.

The guarantee of hearing implied in the due process clause of the Fifth Amendment applies as well to issues of fact as to issues of law. U.S.C.A., Const. Amend. 5. *American Broadcasting Co.* v. *Federal Communications Commission*, 179 F.2d 437, 85 U.S. App. D.C. 343.

An essential element of due process is an opportunity to be heard before reaching of a judgment, and judgment without opportunity to be heard is judicial oppression. *WJR, The Goodwill Station* v. *Federal Communications Commission*, 174 F.2d 226, 84 U.S. App. D.C. 1, reversed 69 S.Ct. 1096, 337 U.S. 265, 93 L.Ed. 1353.

"Hearing" required by due process refers not only to a hearing on truth of allegations made by complainant, but also to hearing on question of law as to sufficiency, of allegations made by complainant. U.S.C.A., Const. Amend. 5. *WJR, The Goodwill Station* v. *Federal Communications Commission*, 174 F.2d 226, 84 U.S. App. D.C. 1, reversed 69 S.Ct. 1097, 337 U.S. 265, 93 L.Ed. 1353.

The right of appeal from a merely erroneous judgment is no part of due process, but the right of a litigant to a trial in accordance with the forms of law and with an opportunity to present his claim or defense, if he desires to do so, is a vital part of due process. *Ackermann* v. *U. S.*,

178 F.2d 983, affirmed 71 S.Ct. 209, 340 U.S. 193, 95 L.Ed. 207, followed in 179 F.2d 236, certiorari granted 70 S.Ct. 996, 997, 339 U.S. 962, 94 L.Ed. 1371.

The basic elements of a full and fair "hearing" include the right of each party to be apprised of all the evidence upon which a factual adjudication rests, plus the right to examine, explain, or rebut all such evidence. *U.S.* v. *Dillman,* 146 F.2d 572, certiorari denied, 65 S.Ct. 1409, 325 U.S. 870, 89 L.Ed. 1989.

The Supreme Court of the United States in *Townsend* v. *Sain,* 372 U.S. 293, 9 L.Ed.2d 770, 83 S.Ct. 745 (this decision is a habeas corpus proceeding but as we have heretofore pointed out the amendment is equally applicable to property rights), demonstrates conclusively that this Court will assume jurisdiction if this Court believes that state courts have ignored constitutional rights in such a way as to violate due process.

In *Townsend* v. *Sain,* supra, on page 787 of the opinion, Mr. Chief Justice Warren with great clarity declared,

> "This Court has consistently held that state factual determinations not fairly supported by the record cannot be conclusive of federal rights. *Fiske* v. *Kansas,* 274 US 380, 385, 71 L ed 1108, 1110, 47 S Ct 655; *Blackburn* v. *Alabama,* 361 US 199, 208, 209, 4 L ed 2d 242, 249, 80 S Ct 274. Where the fundamental liberties of the person are claimed to have been infringed, we carefully scrutinize the state-court record. See, e.g., *Blackburn* v. *Alabama* (US) supra; Moore v. Michigan, 355 US 155, 2 L ed 2d 167, 78 S Ct 191. The duty of the Federal District Court on habeas is no less exacting.
>
> "However, the obligation of the Federal District Court to scrutinize the state-court findings of fact goes farther than this. Even if all the relevant facts were

presented in the state-court hearing, it may be that the fact-finding procedure there employed was not adequate for reaching reasonably correct results. If the state trial judge has made serious procedural errors (respecting the claim pressed in federal habeas) in such things as the burden of proof, a federal hearing is required. Even where the procedure employed does not violate the Constitution, *if it appears to be seriously inadequate for the ascertainment of the truth, it is the federal judge's duty to disregard the state findings and take evidence anew.* Of course, there are procedural errors so grave as to require an appropriate order directing the habeas applicant's release unless the State grants a new trial forthwith. Our present concern is with errors which, *although less serious, are nevertheless grave enough to deprive the state evidentiary hearing of its adequacy as a means of finally determining facts upon which constitutional rights depend.*"

There is still another important facet of due process under the Fourteenth Amendment that should be considered by this Honorable Court. The Fourteenth Amendment guarantees equal protection of the laws to all classes of citizens.

The law has been definitely established with reference to oil companies that a constructive trust can be imposed under circumstances where the companies have had agents unjustly enrich themselves without the knowledge of the oil company.

Shall we have one rule saying that the doctrine of constructive trust cannot be used by individuals but that it can be used by oil companies as a remedial procedure?

The Honorable Supreme Court of Texas has, by virtue of the refusal of the Application for Writ of Error in this cause, affirmed the holding of the El Paso Court that re-

quires the petitioners to seek as their sole remedy, the form of trespass to try title action and one that must be submitted to a jury for determination as to the mineral rights of petitioners. This has reversed the action of the trial court in imposing a constructive trust upon the property here involved as was called for in the Summary Judgment.

To make ourselves clearer, we will quote from a few cases involving oil companies, wherein oil companies have recovered under the doctrine of constructive trust.

In *Pratt* v. *Shell Petroleum Corporation*, 100 F.2d 833, in dealing with a geologist that had been unfaithful to his company, the Court said, and we quote at length from the opinion from page 837:

> "It is further insisted that a trust should not have been imposed for the reason that there was no proof that plaintiff suffered detriment or damage as the result of defendant acquiring the mineral interests. In order to warrant the imposition of a constructive trust, the evidence that a fiduciary relationship existed, and that it was breached must be clear, convincing, and trustworthy. *Colorado & Utah Coal Company* v. *Harris*, 97 Colo. 309, 49 P.2d 429. But such a trust is the formula through which the conscience of equity finds expression. When property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest, equity converts him into a trustee.' *Beatty* v. *Guggenheim Exploration Co.*, 225 N.Y. 380, 122 N.E. 378, 380; *Quinn* v. *Phipps*, 93 Fla. 805, 113 So. 419, 54 A.L.R. 1173. *It was not necessary for plaintiff to show that it suffered detriment, injury, or damage. The law was indubitably contravened by the creation of a situation which lent inducement or temptation for wrongdoing; and a court of equity does not concern itself with the question whether the opportunity was embraced and the prin-*

cipal suffered actual injury. Hoyt v. *Latham,* 143 U.S. 553, 12 S. Ct. 568, 36 L.Ed. 259; *Robertson* v. *Chapman,* 152 U.S. 673, 14 S.Ct. 741, 38 L.Ed. 592; *United States* v. *Dunn,* 268 U.S. 121, 45 S.Ct. 451, 79 L.Ed. 876; *Turner* v. *Kirkwood,* 10 Cir., 49 F.2d 590; *Daus* v. *Short,* supra; *Selwyn & Co.* v. *Waller,* 212 N.Y. 507, 106 N.E. 321, L.R.A. 1915B, 160. The proof was clear, convincing, and trustworthy that a fiduciary relationship existed between the parties, and that defendant breached the duty which it imposed upon him for his own benefit. He acquired the legal title to the royalty interests and the leases in such circumstances that he cannot in good conscience retain the beneficial interests. That was enough to convert him into a trustee. *Robertson* v. *Chapman,* supra; *Trice* v. *Comstock,* 8 Cir., 121 F. 620, 61 L.R.A. 176; *Cunningham* v. *Pettigrew,* 8 Cir., 169 F. 335; *Beatty* v. *Guggenheim Exploration Co.,* supra.

Defendant argues very earnestly that in some instances plaintiff had abandoned all of its leases upon land in a given area before he acquired royalty interests in it, and that in others plaintiff had abandoned all of its leases in a specified territory before the case was tried. The fallacy of the argument is that it rests upon the postulate that actual detriment or damage must be shown in a case of this kind. Repeating, a fiduciary relationship and a breach of duty which it exacts warrants the imposition of a constructive trust where the holder of the legal title cannot in good conscience retain the beneficial interests without regard to the question of pecuniary damages."

Again, petitioners submit that due process has been denied petitioners herein by the action of the El Paso Court and by the action or inaction of the Supreme Court of Texas.

The Court in the *Pratt* case, supra, dealing with the question of laches, held as follows:

> "Plaintiff has not failed to exert reasonable diligence in ascertaining the facts concerning the several interests; there is no showing that the position of defendant changed to his disadvantage during the delay; and for these reasons the doctrine of laches is without application."

It is quite clear that the respondents herein are estopped from pleading laches and *that no delay* in the filing of the suit worked a disadvantage to any of the respondents.

We believe that the decision by Justice Walker of the Supreme Court of Texas, in *Courseview, Incorporated* v. *Phillips Petroleum Co.*, 312 S.W.2d 197, correctly stated the rule with reference to the limitation in a case such as this. In that case, Justice Walker said, on page 205, as follows:

> "Some of our intermediate courts have expressed the view that when a relationship of trust and confidence exists, the defrauded party is under no duty to use any means to discover the fraud until he has notice of facts that would put a person of ordinary prudence on inquiry. See *Atkins* v. *Dodds,* Tex.Civ.App., 121 S.W.2d 1010 (wr. Dis. agr.); *Dean* v. *Dean,* Tex.Civ. App., 214 S.W. 505 (no writ)."

> "It is perhaps more accurate to say that the existence of a relation of trust and confidence does not change the rule that diligence in discovering the fraud is required but does affect the application of the rule. See *Edsall* v. *Edsall,* Tex. Civ. App., 238 S.W. 2d 285 (wr. ref. N.R.E.); *First State Bank of Bangs* v. *Visart,* Tex. Civ. App. 259 S.W. 987 (no writ); 28 Tex. Jur. Limitation of Actions, Sec. 73, p. 162. By entering into fiduciary relations, the parties consent as a matter of law to have their conduct measured by the standards of the finer loyalties exacted by courts of equity. See *Johnson* v. *Peckham,* 132 Tex. 148, 120 S.W. 2d 786, 120 A.L.R. 720. The fiduciary relationship is therefore

one of the circumstances to be considered in determining whether fraud might have been discovered by the exercise of reasonable diligence. It may excuse the defrauded party from taking action that would be required in an arm's-length transaction or from making as prompt or searching investigation as might otherwise be expected. In some situations there is no legal duty to use means available for discovering the fraud, and this is such a case."

For this Honorable Supreme Court of last resort to take any other view renders the Summary Judgment Statute and the magnificent purpose of Rules of Civil Procedure as well as rights accorded under the 14th Amendment of no avail. For instance, Mobil filed a suit to impose a constructive trust in the United States Federal Court which is referred to in the Application for Writ of Error before this Court against Brim and received all of the property fraudulently procured by Brim as a result of conspiracy which he had entered into with Respondents Athey and Hodgden. How, then, can this Honorable Court affirm the action of the lower courts in holding that petitioners should be compelled to establish a superior title to Mobil in a trespass to try title suit when the only remedy sought by Petitioners is to ask that the status quo be enforced and that they be placed in the position of Athey and Hodgden in this case?

To hold otherwise is tantamount to disregarding this conspiracy which is even greater and plainer than the Billy Sol Estes case, wherein Respondent Athey got Respondent Hodgden to do his dirty work as the first part of the scheme to keep Athey from being known as the true purchaser of the property of the Belveals.

Any rule or statute concerning jurisdiction of a Texas court to act must yield since same would be unconstitu-

tional if said rules or statutes conflicted with the inherent right and power of this Court to grant writs of error and to set aside judgments of lower courts of appeal in cases wherein petitioners have been denied due process of law as guaranteed by the Fourteenth Amendment to the Constitution of the United States as in the case at bar. This case, therefore, becomes of such great and unusual importance to the jurisprudence of America that it becomes the duty of this Honorable Court to grant the petition for certiorari and to summarily affirm without further hearing the Judgment of the Trial Court.

PRESENTATION OF FEDERAL QUESTIONS

Federal questions were here involved and directly presented to the Court of Civil Appeals in Point No. Twelve on Motion for Rehearing to the Court of Civil Appeals and appear herein as Exhibit F in the Appendices.

The matter was further preserved and presented to the Supreme Court of Texas in our Application for Writ of Error as Points No. Nineteen and Twenty and appear herein as Exhibits G and H in our Appendices.

The Affidavit of J. K. Brim appears as Exhibit I in our Appendices.

The conclusion of the Motion for Rehearing in the Court of Civil Appeals likewise preserves the federal questions. That conclusion appears as Exhibit J in our Appendices.

The response of petitioners challenging as untrue certain statements made in the last response filed by Mobil Oil Corporation in the Supreme Court of Texas definitely not only preserve this federal question, but should move any Court to the granting of this Petition for Certiorari. A portion of that response appears as Exhibit K in our Appendices.

CONCLUSION

For the foregoing reasons, it is respectfully requested that the Petition for Writ of Certiorari be granted.

JOHN J. WATTS
P. O. Box 1031
Odessa, Texas
JOHN G. PATTERSON
2323 Houston Natural Gas Bldg.
Houston, Texas
V. F. KNICKERBOCKER
P. O. Box 1132
Midland, Texas

By John G. Patterson
JOHN G. PATTERSON
Attorneys for Petitioners

CERTIFICATE OF SERVICE

A copy of the foregoing Petition for Writ of Certiorari was furnished counsel for Respondents as follows: Mr. William L. Kerr, P. O. Drawer 511, Midland, Texas; Mr. W. B. Browder, Jr., P. O. Box 670, Midland, Texas; Mr. Rush Moody, P. O. Box 670, Midland, Texas; Mr. J. K. Brim, Jr., P. O. Box 215, Sulphur Springs, Texas; Mr. Jack Akin, P. O. Box 633, Midland, Texas; Mr. E. B. Mitchell, Jr., P. O. Box 1029, Enid, Oklahoma, by mailing same to all of the above named counsel at their correct post office addresses as above listed on this the 27 day of May, 1969.

John G. Patterson
JOHN G. PATTERSON

EXHIBIT A

Socony Mobil Oil Corporation v. *Belveal*
Cite as 430 S.W.2d 529

Opinion

PRESLAR, Justice.

This is an appeal from an order granting the motions for summary judgment of the plaintiffs, Marion J. Belveal, Golda Belveal Branom, joined by her husband, Dudley Branom, Price M. Belveal, Martin E. Belveal, Will Wyler, Ernest Wyler, and Eldabell McKenzie joined by her husband, R. I. McKenzie, individually and as heirs of Myrtle Belveal, deceased, Ida Oberg, deceased, and Milda Wyler, deceased, against defendants Mobil Oil Corporation, Charles B. Athey and Jack D. Hodgden. All defendants appeal from such judgment, and additionally Mobil Oil Corporation assigns error in the failure of the court to grant its motion for summary judgment.

The order granting the plaintiffs' motions for summary judgment is reversed and remanded for trial, and the order is reversed and rendered as to that portion of Mobil Oil Corporation's motion for summary judgment which pertained to the cancellation of its oil and gas lease.

[1] The plaintiff-appellees in their petition alleged:

> "Plaintiffs bring this suit to set aside certain deeds and to recover possession and title to certain property which was taken from them by the fraud of defendants and which property defendants still fraudulently retain.
>
> "Plaintiffs claim that they are entitled to ownership, title and possession of the following interest in lands and are entitled to have certain deeds set aside

and to have adjudication of or reconveyance to them of ownership, title and possession of the following interest in lands: * * *"

They then pleaded their title from the sovereignty of the soil, maintained that the court had jurisdiction of the out-of-state defendants under Article 1975 (because the suit was one for an interest in land), and they prayed for an award of title and possession. Their motions for summary judgment recite that they are based on their pleadings. Plaintiff-appellees, by their motions for summary judgment action, did not offer proof of their chain of title, superior title from a common source, nor did they offer proof negating the "not guilty" and specially pleaded defenses. Defendants urge that this is fatal to the judgment entered, and they urge that they were entitled to all defenses allowed by their "not guilty" pleas and their specially pleaded defenses of laches, limitations and prior uncanceled deeds between the parties. Plaintiffs now disavow the trespass to try title action and maintain that the judgment can stand solely on their action for cancellation of the deeds under the claim of fraud and breach of fiduciary relationship. The judgment ordered cancellation of the deeds, ordered the defendants to execute various deeds to plaintiffs and their attorneys, and ordered the defendants to account for rents and revenues accrued during their possession. Thus the plaintiffs obtained all which they could have obtained under the trespass to try title count, and much argument is presented as to whether this was or was not such an action. Since plaintiff-appellees now urge that theirs is not a trespass to try title action, in the face of such abandonment it is probably unnecessary to consider such form of action as supporting the summary judgment rendered. *But* they also seek to rely on legal reasons to support the judgment—deeds improperly notar-

ized and acknowledgments of some deeds by a party in interest—and they seek to show their establishment of a chain of title by reference to their pleadings. As to that, suffice it to say that pleadings are not the character of proof required for summary judgment. Rule 166-A, Texas Rules of Civil Procedure. In Land v. Turner, 377 S.W.2d 181 (Tex.1964), the Supreme Court summarized the burden of plaintiffs-appellees under this count:

> "To recover in trespass to try title, the plaintiff must recover upon the strength of his own title. Hejl v. Wirth, 161 Tex. 609, 343 S.W.2d 226 (1961). He may recover by (1) proving a regular chain of conveyances from the sovereign, (2) by proving a superior title out of a common source, (3) by proving title by limitations, or (4) by proving prior possession, and that the possession had not been abandoned."

Each of these is an independent ground of recovery, but none of them were proved in the summary judgment action before us, so that the judgment cannot stand on such grounds in any event, whether abandoned or not.

[2, 3] Plaintiffs pleaded and admitted the execution and delivery of the deeds, their acceptance and retention of the consideration, and the present possession of the lands by the defendants. They contend that they should not be bound by them because of a form of fraud arising out of the deeds having been delivered in blank as to the grantee, the insertion of the name of defendant Athey as such grantee, and the existence of a fiduciary relationship between them and Athey. Stripped of the trespass to try title count, the plaintiffs' cause of action is one for cancellation of deeds by the grantors for fraud. Yet the judgment goes farther. It first cancels the seven deeds in which the plaintiffs are grantors and Athey is the sole grantee. It then orders Athey and the other defendants to execute deeds

of special warranty to the plaintiffs and their attorneys, and to execute certain deeds between the various defendants, some conditioned on the delivery to the clerk of the court of other deeds, apparently to make up deficiencies and correct inequities among those defendants who were strangers to the canceled instruments, but deraigned their title thereunder. The various defendants were ordered to account for rents and revenues accrued during their possession, and in turn were to receive back out of such funds the consideration paid for their deeds. This being a summary judgment case, when we speak of the evidence or proof throughout this opinion, it will mean that we have viewed same in the manner required under Rule 166-A, T.R.C.P., as to which see Great American Reserve Ins. Co. v. San Antonio Pl. Sup. Co., 391 S.W. 2d 41 (Tex.1965). If we assume that the proof was sufficient to warrant cancellation (but we expressly find that it was not), the judgment rendered cannot stand, for it goes beyond cancellation and, in effect, grants recovery as though in trespass to try title. Cancellation was a necessary preliminary step to recovery of the land. Chicago T. & M. Ry. Co. v. Titterington, 84 Tex. 218, 19 S.W. 472; Deaton v. Rush (1923), 113 Tex. 176, 252 S.W. 1025. But the establishing of an equitable right—that they were entitled to cancellation—and the simple act of cancellation, could not operate to take the land away from all who were in possession under claims of title and restore it to plaintiffs. As a very practical matter, the solemn act of canceling the deeds—that they "be set aside, voided and held for naught"—left nothing to be conveyed, as thereafter ordered by the judgment, and certainly nothing to warrant as title.

[4-7] Very simply stated, the suit was for cancellation, but the judgment was for complete recovery of the land, and it was against all parties claiming an interest

therein. Athey was the only defendant who was a party to the canceled instruments. The other defendants were in possession under duly recorded deeds. Not being a party to the instruments sought to be canceled, they could have been made parties to the conflict only because of their interest in the land. Clearly, then, the judgment operates as an adjudication of title to an interest in land. These strangers to the canceled instruments, who were in possession under deeds of record, have had their title and possession taken from them in a summary proceeding seeking cancellation. Such an action to cancel a voidable deed is characterized as an in personam action, rather than a suit for recovery of land. Deaton v. Rush, 113 Tex. 176, 252 S.W. 1025; Glenney v. Crane, 352 S.W.2d 773, ref., n. r. e.; (but see Free v. Owen, 131 Tex. 281, 113 S.W.2d 1221). Regardless of its characterization, it cannot operate to deprive these defendants of their title and possession without an adjudication of the basis of their claims to such title. We think the judgment is also erroneous for that reason. Rule 789 provides that "Under such plea of 'not guilty' the defendant may give in evidence any lawful defense to the action except the defense of limitations, which shall be specially pleaded." This is held to include both legal and equitable defenses. Smith v. Baker (Civ.App.1964), 380 S.W.2d 725; ref., n. r. e., 383 S.W.2d 570. And where the defendant pleads "not guilty", the burden is on the plaintiff, as movant for summary judgment, to show that the defendant had no such defenses. Briggs v. Freeway Park Development Company, Tex.Civ.App., 366 S.W.2d 270, ref., n. r. e.; Gage v. Owen, Tex.Civ.App., 396 S.W.2d 189, n. w. h.; 56 Tex.Jur.2d, "Trespass to Try Title", p. 248, § 119.

[8] We are of the opinion that the prior uncanceled deeds, pleaded by the defendants, is a bar to the judgment rendered. Two sets of deeds were executed by the plain-

tiff-grantors in this transaction. These deeds were identical as to the parties and properties, except that one set was on "Oklahoma forms", while the other set was on "Texas forms". This suit sought cancellation of the "Texas form" deeds only. When the transaction for the purchase-sale of the property was originally consummated, the deeds (seven in number) of the grantors were executed and delivered on the printed Oklahoma forms and the consideration of $100,000.00 was paid. About a week after the delivery of these deeds, on the suggestion of one who acquired an interest thereunder, seven new deeds were executed and delivered on printed Texas forms by all parties grantors. Both sets of deeds were executed in blank as to the grantee, the name of defendant Athey was inserted as grantee by him on these Texas form deeds, and they were thereafter filed for record in Pecos County. The Oklahoma form deeds still remain in the possession of Athey, uncanceled, and unchallenged in fact, and of a form sufficient to pass title fully under Texas law. Perhaps the situation is as simple as this: "A" having given two deeds to "B" conveying Whiteacre, and having sought cancellation of only one of them, has gained nothing, for the other deed is still outstanding until canceled, even as was the one canceled. Whalen v. Richardson, Tex.Civ.App., 353 S.W.2d 941, n. w. h., cites the controlling rule of law:

> "A deed obtained by fraud is not void but voidable only as between the parties to this suit, appellee's title is prima facie good, and it could only be avoided by decree annulling and cancelling the deed executed by appellants. Deaton v. Rush, 113 Tex. 175, 252 S.W. 1025; Michna v. Crane, Tex.Civ.App., 28 S.W.2d 837; Wilkins v. Abercrombie, Tex.Civ.App., 162 S.W.2d 445; Meiners v. Texas Osage Cooperative Royalty Pool, Inc., Tex.Civ.App., 309 S.W.2d 898."

[9] The judgment is also erroneous in that there is an absence of necessary parties, which absence was raised by pleas to abate, and was not cured by the unilateral stipulation of the plaintiffs (referred to as paragraph 31 of their pleadings) as to any innocent purchasers for value.

On the basis of the foregoing, the judgment granting appellee-plaintiffs' motions for summary judgment is reversed and the cause remanded for trial.

MOBIL'S MOTION FOR SUMMARY JUDGMENT

[10] In addition to granting plaintiffs' motions for summary judgment, the judgment here appealed from also denied the motion for summary judgment of Mobil Oil Corporation. By such motion Mobil contended that an oil and gas lease owned by it on a portion of the land involved was a valid and existing lease, and that the fee title it obtained to an undivided interest in the property should be upheld because it was an innocent purchaser for value. The granting of plaintiffs' motion for summary judgment, as noted, ordered the reconveyance of the fee title, and such order also ordered the cancellation of an oil and gas lease under which Mobil was operating and producing, and declared the interest unleased as of March 20, 1962. The premises being in and a part of a unitization agreement, the order also substitutes the plaintiffs as members of such unit from the beginning and effective date of such unitization. Our reversal of such summary judgment order sends the matter back for trial, but we are of the opinion that nothing more remains to be determined as to the cancellation of the oil and gas lease of Mobil, and that Mobil is entitled to judgment of rendition under its motion for summary judgment asking that the lease be declared valid. The original lease was for a ten-year term begining March

19, 1952. On May 19, 1961, some ten months prior to expiration of the primary term, Charles Athey, individually, as trustee for others not parties hereto, and as attorney in fact for the plaintiffs and others, executed an extension agreement, extending the lease for a term of two years. It is this extension agreement which the plaintiffs attacked on the grounds that it was secured through fraud and conspiracy or that Athey was without authority to extend the lease. We think the proof offered overcomes both of these contentions. Any and all acts relied on to establish fraud occurred long after the execution of the extension agreement on May 19, 1961, and there is no fact question as to fraud in the execution. The power of attorney under which Athey acted was executed by plaintiffs and other interest owners and placed of record in 1960. It provides Athey with the power to lease for such terms and prices as he sees fit, but does not specify that he can extend leases. We think the powers given are sufficient to cover the extending that was done here, for the instrument gave Athey the power to do any and everything about the premises which the grantors could do; also, in effect, the extension agreement was a lease. Even if the power did not exist in the instrument itself, the plaintiffs have accepted the benefits of the extension agreement, thus ratifying what was done.

EXHIBIT B

IN THE SUPREME COURT OF TEXAS

December 31, 1968

No. B-1116

Marion J. Belveal et al.

vs.

Socony Mobil Oil Corporation et al.
From Pecos County, Eighth District.

(Filed March 11, 1969)

Application of petitioners for writ of error to the Court of Civil Appeals for the Eighth Supreme Judicial District having been duly considered, and the Court having determined that the application presents no error requiring reversal of the judgment of the Court of Civil Appeals, it is ordered that said application be, and hereby is, refused.

It is further ordered that applicants, Marion J. Belveal et al., pay all costs incurred on this application.

EXHIBIT C

March 5, 1969

No. B-1116

Marion J. Belveal et al.

vs.

Socony Mobil Oil Corporation et al.
From Pecos County, Eighth District.

Petitioners' motion for rehearing of application for writ of error having been duly considered, it is ordered that said motion be, and hereby is, overruled.

I, GARSON R. JACKSON, Clerk of the Supreme Court of Texas, do hereby certify that the above and foregoing is a true and correct copy of the orders of the Supreme Court of Texas in the case numbered and styled as above, as the same appears of record in the minutes of said Court under the dates shown.

WITNESS my hand and the seal of the Supreme Court of Texas, at the City of Austin, this, the 5th day of March, 1969.

Garson R. Jackson, Clerk
By /s/ Jewell Seeliger, Deputy
Mrs. Jewell Seeliger

THE STATE OF TEXAS)
)
COUNTY OF EL PASO)

I, J. W. Florence, Clerk of the Court of Civil Appeals in and for the Eighth Supreme Judicial District of Texas, do hereby certify that the foregoing on two pages, is a full, true and correct copy of the original orders of the Supreme Court of Texas in the case numbered and styled:

B-1116, Marion J. Belveal, et al. vs. Socony Mobil Oil Corporation, et al.,

as the same now appears of record in Volume 15, at Pages No's. 210-211 of the Minutes of this Court.

IN WITNESS THEREOF I Hereunto set my hand and affix the seal of said Court at El Paso, this the 13th. day of May, A.D. 1969.

/s/ J. W. Florence
(Seal) J. W. Florence, Clerk

EXHIBIT D

APPENDIX "A"

"No. 3583

MARION J. BELVEAL, ET AL vs. SOCONY MOBIL OIL COMPANY, INC., ET AL	In the District Court of Pecos, County, Texas 83rd Judicial District

Plaintiffs' Motion for Discovery

TO THE HONORABLE C. E. PATTERSON, JUDGE OF SAID COURT:

Now come MARION J. BELVEAL, GOLDA BELVEAL BRANOM, joined by her husband, Dudley Branom, PRICE M. BELVEAL, MARTIN E. BELVEAL, WILL WYLER, ERNEST WYLER and ELDABELL McKENZIE, joined by her husband, R. I. McKenzie, individually and as heirs of MYRTLE BELVEAL, deceased, IDA OBERG, deceased; and MILDA WYLER, deceased, hereinafter called Plaintiffs, by and through their attorneys of record, and present this, their Motion for Discovery and production of documents and things for inspection, copying, or photographing, and for grounds would show the Court as follows:

1.

In Plaintiffs' Second Amended Original Petition, in paragraph No. 8, plaintiffs make the following allegations:

> 'Plaintiffs allege that the Defendant, J. K. Brim, Jr., was employed by Defendant, Socony Mobil Oil Company, Inc., as a landman over a period beginning February 26, 1952, and ending with Defendant's resignation of January 15, 1963. In the last years of Defend-

ant's employment he served as Division Staff Landman; and, in such capacity, either supervised the purchase by other landmen or brokers of oil, gas and mineral leases and other mineral interests in particular areas assigned to his district, or personally acquired such interests for Socony Mobil Oil Company, Inc. When given the outline of areas in which Socony Mobil Oil Company, Inc., desired to acquire such mineral interest, Defendant, J. K. Brim, Jr., would perceive from information which he received as a result of geological and geophysical studies made by other persons in Socony Mobil Oil Company, Inc.'s employ that such areas assigned to J. K. Brim, Jr., for the acquisition of mineral interests appeared to be most favorable for the production of oil, gas and other minerals, and under all of the circumstances the said J. K. Brim, Jr., was a vice principal of the Defendant, Socony Mobil Oil Company, Inc., so that the fraud of the said J. K. Brim, Jr., was and is imputable to the Defendant, Socony Mobil Oil Company, Inc. In this connection, Plaintiffs allege that in the course of conducting such business in Texas, Defendant, Socony Mobil Oil Company, Inc., maintains in Midland, Texas, and elsewhere in said state, large staffs of geologists, geophysicists, engineers, petroleum engineers, landmen, and other technical experts for the purpose of enabling it to explore various areas throughout the State of Texas so as to determine the location of underground structures which indicate the presence of possible deposits of oil, gas and other minerals, it being the function of these agents and employees to advise and inform the Defendant, Socony Mobil Oil Company, Inc., of their findings and conclusions, including recommended acquisition prices, to the end that the Defendant, Socony Mobil Oil Company, Inc., may successfully carry on its business. Defendant, Socony Mobil Oil Company, Inc., expends large sums of money, not only in the maintenance of its staffs of employees and agents, but in exploring and drilling for oil, gas and other minerals and in producing,

treating, transporting, refining and marketing the same, and the information derived from this work and from the advice, counsel and conclusions of Defendant's agents and employees was made available by the Defendant, Socony Mobil Oil Company, Inc., to the Defendant, J. K. Brim, Jr. The Defendant, J. K. Brim, Jr., had access to all of the above information with reference to the procurement of geological, geophysical and other technical information with the view of locating land that includes structural conditions favorable to the deposit of oil, gas and other minerals, and for the purpose, among others, of defining or outlining an area within which Defendant, Socony Mobil Oil Company, Inc., desired to acquire oil, gas and mineral leases, fee lands, oil, gas and minerals in fee, and other mineral interests. Information as to the exact ground locations as to such a defined or outlined area was in the usual practice of Defendant, Socony Mobil Oil Company, Inc.'s business, furnished to landmen employed by the Defendant, such as the Defendant, J. K. Brim, Jr., in order that said Defendant could acquire such oil, gas and mineral interest within the designated area or areas, whether by acting directly or through an agent known as a broker.'

The foregoing allegations are material. The proof of such allegations is of vital importance to the determination of the ultimate issues in this lawsuit.

2.

Defendant, Socony Mobil Oil Company, Inc., has in its possession by and through its agents, servants, employees and attorneys, documents and things which constitute or contain evidence material to matters involved in this action and which are in the possession, custody or control of Defendant, Socony Mobil Oil Company, Inc.

On December 17, 1964, at Pecos, Texas, in the United States District Court in Civil Action No. 3932, styled Socony Mobil Oil Company, Inc. v. J. K. Brim, Jr., wherein Socony Mobil Oil Company, Inc. was represented by Mr. Tom Sealy and Mr. W. B. Browder of the firm of Stubbeman, McRae, Sealy & Laughlin, Midland, Texas, the following testimony was given by Mr. J. K. Brim, Jr. in response to questions propounded by Mr. Browder:

> 'J. K. Brim, Jr., as Staff Landman from May 19, 1960, until the time his employment ceased, which was February, 1963, had as a part of his job the following duties: "Counsels the Division Landman in the evaluation of land acquisition proposals," "Keeps abreast of land developments and activities of competitors through appropriate industry contacts and interprets the significance of these developments as they relate to Mobil Oil". "Acts for the Division Landman when so designated", "Attends regular exploration department conference thrice weekly and assists Division Landman in securing data pertaining to acquisition and disposition of oil and gas properties . . ."'

At these exploration department conferences there was discussed in Brim's presence:

> 'A wide range of things, everything from rumored acquisitions the company was making to rumored acquisitions the other companies were making, and the current status of the exploration program, and how some field was doing of Mobil's, just everything.'

He discussed the proposed drilling program of Mobil; he would at times have geophysical maps explained to him; at times he would have geological information explained to him. Furthermore, he was

> 'Responsible to the Division Landman for sound advice and counsel pertaining to recommendations for land and lease acquisitions.'

This continued until 1963 and involved areas in Pecos County, Texas. These duties are fully described in a document entitled 'Executive Position Description for Staff Landman, Incumbent J. K. Brim, Jr., of May 19, 1960.' This document was produced by Socony Mobil Oil Company, Inc. in Federal Court in the above styled action and marked as Plaintiff's Exhibit 29 and Defendant, Socony Mobil Oil Company, Inc. still retains in its possession copies of such document.

There is another document which in Federal Court was marked Plaintiff's Exhibit 30, entitled 'Executive Position Description for Division Landman of May 16, 1960' which is material because J. K. Brim, Jr. at times served in the capacity of Division Landman; this document was marked Plaintiff's Exhibit 30. The Division Landman had the following duties:

> 'The Division Landman assists the Division Manager of Exploration as a staff advisor on the land aspects of exploration for crude oil and natural gas', 'Evaluates and makes recommendations to the Division Manager of Exploration on proposals that are submitted to Division by District Exploration Superintendents', 'Regularly counsels with District Exploration Superintendents, District Landmen, and other appropriate personnel on land matters', 'Attends regular Division Exploration Department conference three times per week and assists Exploration Manager in making decisions pertaining to the acquisition and disposition of oil and gas properties, related exploration matters and policies,' 'The Division Landman is responsible for recommending sound land and lease acquisitions in support of exploration programs which are designed to maintain and improve Mobil Oil's reserves of oil and gas, the ultimate resources of the Corporation', 'After analyzing and weighing the merits of proposed deals and negotiations on oil lands and leases, decisions as to the recommendations to top management to acquire or reject properties.'

4.

It was further developed at such trial in Federal Court that J. K. Brim, Jr., in his capacities as a Staff Landman, and as Division Landman, and in the course of his attendance at exploration department conferences, gained knowledge of an agreement between Mobil and Sun Oil Company providing that Mobil would drill a deep well in the Coyanosa area concerning Section 47, in Block OW, In Pecos County, Texas. Copies of such agreement are in existence; the agreement was dated June 27, 1961, and was offered into evidence in Federal Court as Exhibit 31. There was also produced in Court a letter of May, 1962, and a letter dated March 22, 1961; these letters pertain to the Mobil-Sun Oil Company agreement.

5.

At the exploration conference meetings attended by J. K. Brim, Jr., pursuant to his duties as Staff Landman and Division Landman, there were produced letters, papers, memoranda, documents, maps, surface maps, ownership maps, geophysical maps, geological maps, geological information, reports, opinions and analyses. J. K. Brim, Jr., had access to all of this information in the course of his employment for Socony Mobil Oil Company, Inc. All of this information is contained in writings, or on paper or other material substance, that can be produced, inspected, copied or photographed. All of it is in the possession, custody or control of Socony Mobil Oil Company, Inc. All of it is material evidence in this lawsuit. It is material in that it will either tend to support or tend to controvert the allegations in Plaintiff's Second Amended Original Petition, particularly Parapragh No. 8 thereof, or else it will tend to support or tend to controvert the matters of fact or conclusions of law pleaded by defendant, Socony Mobil Oil Company, Inc., and/or the other defendants in this suit.

6.

In Plaintiffs' Second Amended Original Petition, plaintiffs allege in Paragraphs No. 27 and 28 the following:

'27. Plaintiffs allege that it is not the desire of the Plaintiffs, or any of them, to sue for damages based upon the actionable fraud herein, but plaintiffs here sue for rescission of said contracts and restoration of their lands, including oil rentals and royalties. Plaintiffs plead that in the event the oil runs received since the date of said transactions can be returned to the Plaintiffs under the law without Plaintiffs making an election for damages, then in such event, and in such event only, Plaintiffs pray that they have and recover of and from all of the Defendants all rents, royalties and other matters that constitute a part and parcel of the land so being conveyed and paid to the Defendants and each of them, and in this connection, Plaintiffs allege that the Defendant, Jack D. Hodgden, and Defendant, Charles B. Athey, are non-residents of Texas, and Plaintiffs are entitled to have an accounting rendered into this Court showing the amounts of rents, royalties and other things of value received from anyone as a result of the conveyances herein complained of that are real property and constitute a part of the lands conveyed; that Defendant, Socony Mobil Oil Company, Inc., should be required to file into this Court a full and complete accounting showing all rents and royalties and all other things of value that have been paid or to be paid in the future covering Plaintiff's interest in the lands.

'28. Plaintiffs further allege that the oil runs currently being paid to the Defendants that are attributable to Plaintiffs' interest and that the acts of the Defendants and each of them in receiving said oil runs amounts to a daily willful conversion of Plaintiffs' property and Plaintiffs allege, in this connection, that as a matter of law the oil runs from said land are a part of the real property which Plaintiffs

own and are entitled to have and recover, and said oil runs are a part of their remedy for cancellation of the deeds and arises as a result of the Plaintiffs' ownership of the land and does not in any sense constitute damages, and Plaintiffs herein do not maintain in any way, nor do they seek any damages; in this connection, Plaintiffs allege that there are now five producing oil wells located upon said lands, the value of said wells runs into millions of dollars, the exact amount of which is unknown to the Plaintiffs; that the value of the interest of Plaintiffs' fraudulently procured and taken away from them by the fraud of the Defendants and each of them, as hereinabove set out, and on account of which rescission of the said deeds and restoration of said property is herein prayed for. In this connection, Plaintiffs do not know the amount of the oil runs, royalties or rents or other parts paid to the defendants as a part of their purported ownership of the land since the date of the execution of said fraudulent conveyance, but the amounts so paid are recoverable as a part of Plaintiffs' ownership of the land and may amount to enough to restore to the Defendants the consideration paid Plaintiffs, to-wit: the sum of $105,000.00, for said lands, and Plaintiffs pray that the Court appoint a receiver and that said recovery under the direction of the Court determine the amount in value of oil runs, rents, royalties and other things of value paid to the defendants and each of them, as a part of the ownership of said lands, and that if same now be sufficient, that same is tendered to the Defendants herein and in any event, that the Judgment of the Court should provide and the Plaintiffs here now tender out of said oil runs, royalties and other things of value paid as a part of the ownership of said land, such an amount of said oil runs in the future if same be necessary which would fully restore to the Defendants herein the sum of $105,000.00 herein paid.

As a part of its suit, Plaintiffs seek to recover possession of certain mineral interests. These mineral interests

constitute land or an interest in realty under the laws of the State of Texas under the well recognized doctrine that oil and gas in place are realty. However, since the fraudulent transactions which plaintiffs complain of, Defendants have brought oil and gas from its place under the surface to the top of the ground where it is ordinarily considered to be personalty. Nevertheless, under the rules of equity, particularly the doctrine of equitable conversion, defendants should not be permitted to defeat plaintiffs' recovery of all that was taken from them by the technical distinction between personalty and realty. Equity regards as done that which should have been done and the Court is entitled to disregard the attempted conversion of the oil and gas interests into personal property and is entitled to declare that the oil and gas runs are realty under the doctrine of equitable conversion.

For all of the foregoing reasons, good cause exists for an order of the Court requiring defendants to produce the record showing the facts and circumstances surrounding the removal of all minerals and each instance of removal of any minerals from the lands in question including the dates, quantity, quality, purchaser and all other information pertinent thereto such as may be disclosed by reports of pumpers, gaugers, pipelines, purchasers, division orders and financial records or records of disbursements.

7.

None of these documents constitute written communications passing between agents or representatives or the employees of any party to the suit, or communications between any party and his agents, representatives or their employees made subsequent to the occurrence or transaction upon which the suit is based and made in connection with the prosecution, investigation or defense of such

claim, or the circumstances out of which same has arisen. Any of these documents or things which were made subsequent to the occurrence or transaction upon which this suit is based were not made in connection with the prosecution, investigation or defense of such claim or the circumstances out of which same has arisen.

WHEREFORE, movants pray that upon notice to all other parties and subject to such limitations as the Court may impose, that this Honorable Court order Socony Mobil Oil Company, Inc. to produce and permit the inspection and copying or photographing by or on behalf of the moving party of all of the foregoing designated documents, papers, books, accounts, letters, photographs, objects or tangible things, and further that the Court enter its order specifying the time, place and manner of taking the copies and photographs, and shall prescribe such terms and conditions as are just and that movants have such other and further relief, both special and general, at law or in equity, as they may show themselves justly entitled to receive, either at law or in equity.

John J. Watts
P. O. Box 1031
Odessa, Texas FE 2-5795

Verne F. Knickerbocker
P. O. Box 1132
Midland, Texas MU 2-3443
By: John J. Watts
Attorneys for the Plaintiffs"

EXHIBIT E

APPENDIX "B"

"No. 3583

MARION J. BELVEAL, ET AL
vs.
SOCONY MOBIL OIL COMPANY, INC., ET AL

In the District Court of Pecos County, Texas 83rd Judicial District

Order for Discovery and Producing of a Document, etc.

On this day came on to be considered a Motion of Plaintiffs that the Court order defendant, Socony Mobil Oil Company, Inc. to produce and permit the inspection and photographing or copying by and on behalf of such moving party of certain designated and described desired documents or things as set out in said motion and it appearing that defendant has been given notice of such motion and that such motion shows good cause, as in truth there is, and should be granted, it is accordingly ordered:

That defendant, Socony Mobil Oil Company, Inc., be and it is hereby ordered to produce at the office of the District Clerk at the Courthouse of Pecos County, Fort Stockton, Texas, at 10:00 o'clock a.m. on the 5th day of January 1967, and to let such documents or things remain until plaintiff has had opportunity to inspect, photograph and copy all of them, the following and described documents or things:

(a) A document entitled Executive Position Description for Staff Landman, Incumbent J. K. Brim, Jr., of May 19, 1960.

(b) A document entitled Executive Position Description for Division Landman of May 16, 1960.

(c) Agreement dated June 27, 1961, between Mobil and Sun Oil Company providing that Mobil would drill a deep well in the Coyanosa area concerning Section 47, in Block OW, Pecos County, Texas.

(d) Letter of May, 1962, pertaining to such agreement described in "C" above.

(e) Letter dated March 22, 1961, pertaining to such agreement described in "c" above

(f) The following papers, documents or things which were produced at exploration conference meetings attended by J. K. Brim, Jr. as staff landman and/or division landman insofar as same pertains to any of the lands or interests described in the deeds which plaintiff has brought suit to set aside.

(1) letters
(2) papers
(3) memoranda
(4) documents
(5) maps
(6) surface maps
(7) ownership maps
(8) geophysical maps
(9) geological maps
(10) geological information
(11) reports
(12) opinions
(13) analyses

(g) With respect to the lands described in the deeds which plaintiff has brought this suit to set aside, produce records or copies thereof showing the following facts, circumstances surrounding the removal of all

minerals from such lands and of each instance of such removal of any minerals.

(1) date
(2) quantity
(3) quality
(4) purchaser
(5) pumpers' reports
(6) gaugers' reports
(7) pipe line records
(8) purchasers
(9) division orders
(10) records of disbursement or financial records

The taking of such copies and photographing may be done by any reasonable method which does not materially damage the thing or document being copies or photographed. Such copying, inspecting and/or photographing must be done on the premises of the Pecos County Courthouse unless consent to other arrangement is given by defendant or its agent or attorney. The agent or attorney of defendant may be present at all times while any inspection, photographing or copying of such papers, document or thing is being carried out by plaintiffs. Such inspection, photographing or copying may be done in person by plaintiffs or by their designated agents or attorneys.

SIGNED AND ENTERED this 31 day of December, 1966.

/s/ C. E. Patterson
Judge Presiding"

EXHIBIT EA

No. 5926

IN THE
COURT OF CIVIL APPEALS
EIGHTH SUPREME JUDICIAL DISTRICT

MARION J. BELVEAL, ET AL.,
Petitioners

vs.

SOCONY MOBIL OIL CORPORATION AND CHARLES B. ATHEY and JACK D. HODGDEN,
Respondents

Motion for Recall and Stay of Judgment Issued As Mandate

(Filed May 9, 1969)

TO THE HONORABLE SUPREME COURT OF TEXAS:

Now come the petitioners in the above entitled and numbered cause, and pray for recall and stay of the judgment issued as mandate in the above entitled and numbered cause in order to enable petitioners to apply for and attempt to obtain a writ of certiorari from the Supreme Court of the United States, and in this connection petitioners would show:

1.

That the Motion for Rehearing of the Application for Writ of Error in the above entitled and numbered cause was overruled on March 5, 1969; that under the law petitioners have ninety (90) days in which to perfect an appeal to the Supreme Court of the United States, and while peti-

tioners do not believe that it is necessary that the mandate be recalled in this case, still it would appear that the proper mode of procedure would be for the mandate to be recalled since it is quite evident that this Court could not destroy the constitutional and statutory right of petitioners to file the petition for certiorari within the time provided by law, and petitioners further recognize that it is not the desire of this court to destroy petitioners' right of appeal.

WHEREFORE, petitioners pray that this Court enter an order recalling and staying the judgment as mandate, and in this connection petitioners herewith tender a suggested form of order for this Honorable Court to enter, a copy of which has been furnished to all parties, together with a copy of this Motion, and pray for such other and further relief as petitioners may be entitled to receive.

Respectfully submitted,

Watts and Patterson
P. O. Box 1031
Odessa, Texas
V. F. Knickerbocker
P. O. Box 1132
Midland, Texas
By: /s/ John J. Watts
Attorneys for the Petitioners

THE STATE OF TEXAS)
)
COUNTY OF EL PASO)

I, J. W. Florence, Clerk of the Court of Civil Appeals in and for the Eighth Supreme Judicial District of Texas, do hereby certify that the foregoing on three pages, is a full, true and correct copy of appellees' Motion For Recall And Stay Of Judgment Issued As Mandate, filed in this Court on the 9th day of May, A.D. 1969, in cause No. 5926, styled:

Socony Mobil Oil Corporation and Charles B. Athey and Jack D. Hodgden,
Appellants,

v.

Marion J. Belveal, et al.,
Appellees.

IN WITNESS THEREOF, I hereunto set my hand and affix the seal of said Court, at El Paso, this the 21st day of May, A.D. 1969.

J. W. Florence
Clerk
By /s/ R. E. Strassburger
Deputy

(Seal)

EXHIBIT EF

No. 5926

IN THE
COURT OF CIVIL APPEALS
EIGHTH SUPREME JUDICIAL DISTRICT

MARION J. BELVEAL, ET AL.,
Petitioners

vs.

SOCONY MOBIL OIL CORPORATION and CHARLES B. ATHEY AND JACK D. HODGDEN,
Respondents

APPEAL FROM EL PASO COURT OF CIVIL APPEALS
SITTING AT EL PASO, TEXAS

Order Recalling and Staying Judgment Issued As Mandate

(Filed May 21, 1969)

ON CONSIDERATION of the Motion of petitioners for recall and stay of judgment issued as mandate in the above entitled and numbered cause, to properly insure that petitioners may apply for and attempt to obtain a writ of certiorari from the Supreme Court of the United States, it is ORDERED that the Judgment of this Court to be issued as mandate to the Clerk of the Trial Court be stayed for a period of ninety (90) days from March 5, 1969, the stay to remain in force until the final disposition of the case by the Supreme Court of the United States, and provided further that within the period of ninety (90) days from March 5, 1969, that there shall be filed with the Clerk the certificate of the clerk of Supreme Court that certiorari petition and record have been filed. It is

further ordered by this Court that the clerk shall issue the judgment as mandate upon the filing of a copy of the order of the Supreme Court denying the writ, and that same shall issue unless the above mentioned certificate shall be filed with the Clerk of this Court within the ninety (90) days above specified

ENTERED this 21st day of May, 1969.

/s/ Alan R. Fraser,
Chief Justice, Eighth Court
of Civil Appeals

THE STATE OF TEXAS)
)
COUNTY OF EL PASO)

I, J. W. Florence, Clerk of the Court of Civil Appeals in and for the Eighth Supreme Judicial District of Texas, do hereby certify that the foregoing on two pages, is a full, true and correct copy of the Court's Order, dated May 21st, A.D. 1969, granting appellees' Motion For Stay Of Judgment Issued As Mandate, in cause No. 5926, styled:

Socony Mobil Oil Corporation and Charles B. Athey
and Jack D. Hodgden,
Appellants,

v.

Marion J. Belveal, et al.,
Appellees.

IN WITNESS THEREOF, I hereunto set my hand and affix the seal of said Court, at El Paso, this the 21st day of May, A.D. 1969.

J. W. Florence
Clerk
By /s/ R. E. Strassburger
Deputy

(Seal)

EXHIBIT F

POINT No. 12

The opinion in this case taking from Appellees a judgment calling for the imposition of a constructive trust on lands wrongfully taken from Appellees and cancelling the reconveyance of said lands by the Trial Court to Appellees by the opinion in this case and calling for an affirmance of Mobil's lease, as a matter of law, and for a reversal and remand for fact determination between the other parties here involved, and calling and requiring the making of new parties and proof of title as required in trespass to try title cases, constitutes such a wide and unusual departure from established principles of law in the administration of justice that said opinion deprives Appellees herein of their Constitutional rights under the Fourteenth Amendment of the Constitution of the United States which provides in part, ". . . nor shall any State deprive any person of . . . or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws. . . ."

EXHIBIT G

POINT No. 19

The Honorable Court of Civil Appeals erred in holding that after the deeds were canceled there was nothing for Respondents to convey since cancellation of the deeds was not a prerequisite under Texas law to the imposition of a constructive trust and an order directing Respondents to reconvey by deed title to Petitioners in that by this judgment of the Trial Court the first seven set of deeds, as well as the second seven set of deeds were all determined to be void and no legal effect and after the Trial Court's judgment calling for a reconveyance was complied with, all prior deeds were effectively set aside.

EXHIBIT H

POINT No. TWENTY

The Honorable Supreme Court of Texas erred in refusing Petitioners' Application for Writ of Error, N.R.E., and in effect overruling Point No. 13 of Petitioners' Application for Writ of Error on file in this Court, which Point was as follows, to-wit:

> "The Honorable Court of Civil Appeals erred in going further than merely reversing on its merits the Summary Judgment canceling Mobil's lease in that under settled law, as declared by the Supreme Court of Texas, no appeal lay from the order of the Trial Court refusing judgment to Respondents and the motion of the Petitioners for Summary Judgment afforded no basis for a judgment in favor of the Respondents and this is particularly true in this case wherein the refusal of Respondent Mobil to comply with the Trial Court's order of discovery effectively prevented the Petitioners from proving the fraud of Mobil to the satisfaction of the Court of Civil Appeals with reference to when fraud occurred with reference to Mobil's procurance of the lease extension agreement and Petitioners say alternatively that if summary judgment calling for cancellation of Mobil's lease is not affirmed on rehearing by this Court, then in such event, this cause as to the issue of cancellation of the lease should be reversed and remanded for enforcement by the Trial Court of the Court's previous orders of discovery in order that the evidence as to this issue may be fully developed for the determination of the Trial Court or jury."

EXHIBIT I

The affidavit of J. K. Brim was as follows:

No. 3583

In the
DISTRICT COURT OF PECOS
COUNTY, TEXAS
83rd Judicial District

MARION J. BELVEAL, ET AL

v.

SOCONY MOBIL OIL COMPANY, INC., ET AL

STATE OF TEXAS)
COUNTY OF HOPKINS)

Affidavit

Before Me, the undersigned authority, a Notary Public in and for Hopkins County, Texas, on this day personally appeared J. K. Brim, Jr., who being by me here and now duly sworn, upon oath says:

My name is J. K. Brim, Jr. and I am one of the defendants in the above entitled and numbered cause. Back in the early part of 1961, as set out in my deposition, I was advised by the land department of Mobil Oil Company that there was an undisclosed trust affecting the Belveal interest and that of a number of other parties not involved in the present suit and I was instructed that one Charles B. Athey, a defendant in the present suit, was acting as a trustee for all of said parties, and having theretofore been advised by Mobil Geophysical Department that the properties appeared to have great potential for oil and gas production and having been shown oil maps and

geophysical structure maps showing the probable value of same, I was instructed to try to get the said Athey to procure a Power of Attorney from all parties so that we could get an extension of a lease involving said property that was about to expire. I, acting solely as the agent for Mobil and for no one else and not for myself, did contact the said Charles B. Athey and convey to him the information that the property appeared to have great potential as oil and gas producing property, that well was to be drilled to the Ellenberger and that it would be wise for him to secure a Power of Attorney so that he could represent the other parties, including the Belveales' and in order that he might renew and execute leases and I then advised him that a well was to be drilled to the Ellenberger on adjacent property and that said property appeared to be valuable. He advised me that he would contact the various owners for the purpose of getting the Power of Attorney from the Belveals' and others and thereafter, he did procure a Power of Attorney and executed an extension on said lease. Thereafter, the title department of Mobil and I, acting at their instruction and on their behalf, prepared a designation of interest instrument in an effort to render any defects which might be existing in said lease curable. At said time I was acting strictly as an agent and employee in the course of my employment for Mobil and was doing my best to represent my principal and had violated no interest of Mobil in any manner or to any extent and violated no rules or regulations of Mobil, but acted completely in accord with what Mobil had instructed me to do.

/s/ J. K. Brim, Jr.
J. K. Brim, Jr.

Subscribed and Sworn To Before Me, by the said J. K. Brim, Jr. this 7th day of February, A. D. 1967, to certify which witness my hand and seal of office.

/s/ Gene Bening
(Seal) Notary Public in and for Hopkins County, Texas

EXHIBIT J

Conclusion

The Appellees have been defrauded. The Appellants have been unjustly enriched, and this Honorable Court has, without adequate excuse in the law, disregarded the theory of constructive trust, and is now requiring these Appellees to make parties whose interests are not involved, new parties to an action that does not cover the principles involved in this lawsuit of constructive trust. In so doing, the opinion in this case becomes an *instrument of oppression and injustice insofar as the rights of Appellees are concerned;* and we respectfully request this Honorable Court to reconsider the law and facts and upon such reconsideration to grant this Motion for Rehearing, and to sustain the Trial Court's Judgment.

The Appellees feel strongly and urge most respectfully and sincerely that the opinion of this Honorable Court depriving them, without just cause, of the property on which the Trial Court imposed a constructive trust and on which property the Trial Court correctly called for conveyances by the responsible Appellants so as to require the making of new parties and a trial by jury is wholly unauthorized and constitutes such a departure from the established law of both Texas and the Federal Courts, including all judicial concepts for the proper administration of Justice, as deprives Appellees of their rights under the Fourteenth Amendment of the Constitution of the United States.

This point must be here raised in order that it may be considered by this Court and by the Supreme Court of Texas, and by the Supreme Court of the United States if such action becomes necessary.

Our Fifth Circuit has firmly established in *Randel* v. *Reto*, 354 F. 2d 496 (cert. dis.), that the conclusion of the Texas Court of Criminal Appeals that Appellant was not denied his constitutional right to trial by jury under Texas State Constitution was not binding on Federal Courts with respect to any constitutional right of trial by jury guaranteed by the Federal Constitution, nor with respect to due process of law clause of the Fourteenth Amendment, U.S.C.A., Constitution, Amend. 13, §2, Amendments 6 to 14, is in point here. Under the clear terms of this Amendment, it applies to—"life, liberty, or property."

The rights of the Appellees to summary judgment under valid state rules should not be lightly taken away and an entire cause of action destroyed of constructive trust because this Court chooses to call it one in trespass to try title without any basis in law supporting such a decision as we have specifically set out in this motion for rehearing and in our original brief.

A review of the cases of the Supreme Court of Texas and the Supreme Court of the United States, all of which have been discussed in great detail in our original brief, shows that no principle has been more sacredly or jealously guarded than the right of parties defrauded by a trustee to impose a constructive trust in cases where the trustee and those claiming under him are unjustly enriched.

Courts of equity will not and should not permit a trustee to get by with what Athey, with the help of Hodgden and Brim acting for Mobil, here pulled.

This action calls for condemnation of the parties Appellants as well as affirmance of the Trial Court's judgment by this Honorable Court. No stronger or more appropriate words can be found to close this motion with than the words of Judge Hutcheson when the Fifth Circuit

reversed the lower Court's judgment and held that the plaintiff was entitled to recover as a matter of law with this language:

> "While the facts of this case indicate that Appellee did not exercise good faith in procuring the quit-claim deed, it is not necessary for us to so hold, for under the circumstances here, the failure of the fiduciary to make a complete and fair disclosure of all of the material facts relevant to his father's estate constituted fraud as a matter of law and evidences conduct *which a court of conscience will not tolerate.*
>
> It follows that the Trial Court's finding to the contrary is clearly erroneous and must be set aside."

Murphy v. *Cartwright*, 5th Cir., 202 F. 2d 71.

This decision was recognized as controlling law by the Eastland Court in a companion case in which counsel for Mobil, the Honorable Bill Browder, represented the losing party. See *Cartwright* v. *Minton*, 318 S.W. 2d 449 (writ of err. ref.)

In this case, the Texas Court said in part, speaking of the duty of one occupying a fiduciary relationship such as Athey:

> "It was his duty to fully and fairly disclose to her all of the pertinent facts as candidly as possible. The law will not permit him to take advantage of those whom he represents."

How can this Honorable Court ignore this kind of law so clearly revealed by all of the evidence in this cause by necessary pleadings and correct judgment in this cause without denying to Appellees' due process of law as guaranteed by the Fourteenth Amendment?

It is to be noted that in the Federal Court in Cartwright it was the quit-claim deeds procured in bad faith that the 5th Circuit disregarded as a matter of law.

The equity and the conscience of this case and of this court requires that this Court in similar fashion disregard the first set of deeds and affirm the judgment of the Trial Court on the breach of the fiduciary Athey's duties to Appellees and those claiming under him who had notice and knowledge.

We apologize to this Honorable Court for the necessity of raising the claim of denial of due process and of equal protection, since we realize that this learned and Honorable Court has spent months in good faith studying the record in this case, but we do not comprehend any basis in law or in equity for the opinion which requires such harsh and unnecessary action as the opinion requires in order that the sacred property rights of Appellees may be preserved.

We likewise recognize that this is an unchartered sea upon which we sail. We further recognize the difficulty of procuring a review by the Supreme Court of Texas once this Honorable Court has held a matter, a question of fact for the determination of the Jury, but the Supreme Court of the United States has in many recent decisions, including the recent Midland County Redistricting decision, breathed new life into these Constitutional provisions, and we would be remiss in our duty to our seriously aggrieved clients who have suffered imponderable delay at their elderly ages if we did not raise each point that we feel that we are legally required to raise in order to insure that their Constitutional rights are preserved.

Rule 170, T.R.C.P. is likewise of great importance to the orderly development and preservation of impartial trials wherein efforts of a party to secure the truth under order of the Court should not be destroyed by the whims and caprices of counsel for Appellant Mobil, or by any other counsel in any other cause.

In the face of this record this Honorable Court has by its refusal to enforce this rule, placed its implied stamp of approval upon the open defiance of not only the rule, but of a solemn order entered by a Trial Court who had the full right to enter the order and to exact the penalty of a default judgment if needed for its disobedience.

In this connection, we feel that the failure to enforce Rule 170 amounts to denial of due process in administrative proceedings of a judicial nature which generally requires conformance to fair practices of Anglo-Saxon jurisprudence, and this is usually equated with adequate notice and fair hearing. Hornsby v. Allen, C.A. Ga. 1964, 326 F. 2d 605, rehearing denied 330 F. 2d 55.

Due process in administrative proceedings of a judicial nature requires that parties be allowed opportunity to know opposing parties' claims, to present evidence to support their contentions, and to cross-examine opposing parties' witnesses.

The Supreme Court of Texas in *Rogers* v. *Royalty Pooling Company*, 302 S.W. 2d, in a per curiam opinion held as follows:

> "(1-3) At the same time the appellate court, while correctly reversing, on the merits, the summary judgment rendered for the petitioner (appellee), *erred in going further and rendering judgment for the respondents (appellants)* since no appeal lay from the order of the trial court refusing summary judgment to the respondents, and the motion for summary judgment of the petitioner (appellee) afforded no basis for a judgment in favor of the respondents (appellants). In this behalf the judgment below conflicts with our own decision in Wright v. Wright, 154 Tex. 138, 274 S.W. 2d 670. This being so, we have elected to exercise the authority provided for such situations in the latter portion of Rule 483, Texas Rules of Civil Proce-

dure, and hereby reverse 'on the application for writ of error', remanding the cause to the district court for such further proceedings as may be appropriate."

The rule in *45 Tex. Jur. 2d*, p. 685, likewise supports the points urged by Appellees that judgment should not be rendered as a matter of law as to cancellation of Mobil's lease by the Honorable Court of Civil Appeals, wherein the following is stated:

> "In reversing a summary judgment where there has been no trial on the merits, judgment will not be rendered by the appellate court if there is any matter of fact to be determined, or if justice may be better served by a remand. And a court of civil appeals though correctly reversing, on the merits, a summary judgment rendered for the plaintiff, errs in going further and rendering judgment for the defendants, since no appeal lies from the trial court's order refusing summary judgment to the defendants, and the plaintiff's motion for summary judgment affords no basis for a judgment in favor of the defendants. Again, a court of civil appeals is without power to direct a district judge by mandamus to enter any particular character of judgment on a motion for summary judgment. But where summary judgment has been erroneously granted because of failure to show that there is no genuine issue as to any material fact, remand does not imply a necessity for a trial on the merits if *under additional pleadings, admissions or evidence it is conclusively determined that no genuine issue of fact exists.*"

EXHIBIT K

Response of Petitioners Challenging As Untrue Certain Statements Made in the Last Response Filed by Mobil Oil Corporation

TO THE HONORABLE SUPREME COURT OF TEXAS:

Petitioners challenge as untrue and material part of the following portion of Respondent Mobil Oil Corporation's response to petitioners motion for rehearing, on page 3 of said responses:

> "They cannot find in the record (for indeed it is not there) any order of the court reciting contempt on the part of Mobil or its attorneys. This is a full and complete answer to petitioners' claim of a violation of due process rights.
>
> "The Petitioners, however, go outside the record to claim that such disobedience did occur; *perhaps we can be forgiven if we support the record as it is before this court by asserting that there was no disobedience, no disregard of the trial court discovery order.*
>
> "Respondent's counsel Tom Sealy and Jack Akin took Mobil's records to Fort Stockton for examination by petitioners' counsel as called for in the trial court discovery order. For whatever reason there might have been, Mr. Watts did not appear in Fort Stockton for examination of the records. The records were returned to Midland by Mr. Sealy and Mr. Akin."

This statement is absolutely false as to the portions italicized as above set out and hereinafter italicized. It is true that Tom Sealy and Jack Akin took an old map or maps, together with a tax analysis purporting to show the question of Mobil's knowledge of the value at the time that Mobil procured their lease and it is true that petitioners' counsel had two expert witnesses go to Fort Stockton for the purpose of looking over this alleged information and

that V. F. Knickerbocker, of counsel for petitioners, examined same.

It is further true that John J. Watts was not present to examine the scanty records, if they can be called such, which Mobil produced in such a cat and mouse manner in carrying out their game of hide and seek.

The records thus furnished by Mobil shed no light whatsoever upon the real issues in this case and neither did it constitute even a partial compliance with the order of the trial court for discovery.

None of these important records were produced. As a matter of fact, to show the utter falsity of the claim as made by respondent's counsel, who undoubtedly must be acting out of a sense of desperation, show that this summary judgment was entered on March 30, 1967 (Tr. Vol. 4, p. 1221) by the District Court of Pecos County, Texas.

Thereafter, the petitioners filed in the United States District Court for the Western District of Texas *a motion to compel the return of exhibits, which said motion is styled as Exhibit* "A" *and a certified copy of same is attached to this record for the purpose of verification.*

It is most difficult to understand how any court could believe that Mobil had complied with the trial court's order of discovery in view of this motion made after the summary judgment here on appeal was entered.

This contention of petitioners as to the falsity of Mobil's claim is likewise shown by the answer of respondents which was filed in the Federal Court at Pecos, and Mobil at that time was *still contesting the return of these exhibits called for by the order of discovery of the Pecos County trial court.*

The United States District Court has never acted upon this motion even though a hearing was had thereafter in El Paso before the Honorable Ernest Guinn.

Respondents admit, in effect, that due process has been denied if petitioners are right concerning Mobil's failure to comply with the trial court's order of discovery.

It is true that there was no order of the trial court entered citing Mobil for contempt, but petitioners suggest that this is immaterial.

The trial court had two alternatives. He could either cite Mobil for contempt or he could enter a default judgment against Mobil by means of a summary judgment, as the trial court undoubtedly had the right to do under Rule 107, T.R.C.P., for respondent's failure to comply with the discovery order. This the trial court did, and this point is urged in petitioners' Point No. 5 of the Motion for Rehearing.

Petitioners further submit that the action of the El Paso Court without giving Petitioners an opportunity to examine the evidence called for by the order of discovery is clearly erroneous.

The facetious argument is made by Mobil that petitioners assume a false position in that petitioners claim that their motion for summary judgment as against Athey and Hodgden was good but that the summary judgment of Mobil constituted a denial of due process.

On Page 2 of their response, Mobil *claims that this is a novel concept.* That "*. . . it can be stated only through considerable craft and imagination.*" We respectfully submit that this argument is wholly without foundation as shown by the record in this cause.

In Athey's case we are dealing with a judicial admission of wrongdoing by a defendant who was also a trustee of petitioners, which was binding upon the defendants Athey and Hodgden. This kind of matter cannot be explained away in any fashion on a new trial but Athey is bound by such judicial admission or wrongdoing. *This would constitute a clear ground for summary judgment against Athey.*

As to Mobil, the El Paso Court of Civil Appeals has held their lease good when it is clearly apparent from the affidavit and deposition of Brim, which is before this Court, as well as from the *failure of the respondent to comply with the trial court's order of discovery, that no adequate opportunity was ever given on* the motion for summary judgment for petitioners to show when Mobil's fraud began.

We have further pointed out that under the Supreme Court decision in Rogers v. Royalty Pooling Company et al., 320 S.W. 2d 938, there is a clear error in the El Paso Court's going further and rendering judgment for the respondents under the facts of this case, since to do so misplaces the burden of proof in such a way as to deny due process to the petitioners herein as is so well discussed and set forth in the United States Supreme Court decision in *Armstrong v. Manzo,* 380 U.S. 545, discussed on pages 34 and 38 of the Brief of petitioners in support of motion for rehearing.

LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
JUN 23 1969
JOHN F. DAVIS, CLERK

No. [redacted] 168

In the

Supreme Court of the United States

OCTOBER TERM, [redacted] 1969

MARION J. BELVEAL, ET AL.,

Petitioners,

v.

SOCONY MOBIL OIL CORPORATION,
CHARLES B. ATHEY AND JACK D. HODGDEN,

Respondents.

On Petition for a Writ of Certiorari to the Court of Civil Appeals for the Eighth Supreme Judicial District of Texas, Sitting at El Paso, Texas.

BRIEF FOR RESPONDENTS CHARLES B. ATHEY AND JACK D. HODGDEN IN OPPOSITION

E. B. MITCHELL, JR.,
P. O. Box 1029,
Enid, Oklahoma 73701,

GERALD FITZ-GERALD,
JAMES FITZ-GERALD, III,
WILLIAM L. KERR,
P. O. Drawer 511,
Midland, Texas 79701,

Attorneys for Respondents, Charles B. Athey and Jack D. Hodgden.

Of Counsel:
MITCHELL, MITCHELL,
DECLERCK & COX
Security National Bank Building,
Enid, Oklahoma 73701,
KERR, FITZ-GERALD & KERR,
111 Midland Tower Building,
Midland, Texas 79701.

P. O. BOX 10543 — 1455 ROUND TABLE DRIVE — DALLAS — ME 1-3130
THE WARLICK PRESS DIVISION, STECK-WARLICK CO.

INDEX

	Page
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statement of the Case	2-11
Argument	12-14
Jurisdiction	12
The Texas law was properly determined and then aptly applied	12-14
Conclusion	15
Certificate of Service	16

Citations

Page

Cases

Cowden v. Bell, (Tex. Sup. Ct. 1957), 300 S.W. 2d 286 14

Great American Reserve Ins. Co. v. San Antonio Plumbing Sup. Co., (Tex. Sup. Ct. 1965) 391 S.W. 2d 41 13-14

Houston v. Moore, (1818) 3 Wheat. (U.S.) 433, 4 L. Ed. 428 12

Urie v. Thompson, (1949) 337 U.S. 163, 197, 93 L. Ed. 1282, 1293 12

Rules

Rule 788, Texas Rules of Civil Procedure 6

Statutes

28 USCA 1257 12

Texts

Annotations 89 L. Ed. 1186, ex. p. 1188 and 97 L. Ed. ex. p. 208 and 212 12

86 C.J.S. Para. 71, p. 463 8

15 Tex. Jur. 2d, Para. 8, 14, pp. 165, 175 8

In the

Supreme Court of the United States

OCTOBER TERM, 1968

No. 1452

MARION J. BELVEAL, ET AL.,

Petitioners,

v.

SOCONY MOBIL OIL CORPORATION,
CHARLES B. ATHEY AND JACK D. HODGDEN,

Respondents.

On Petition for a Writ of Certiorari to the Court of Civil Appeals for the Eighth Supreme Judicial District of Texas, Sitting at El Paso, Texas

BRIEF FOR RESPONDENTS CHARLES B. ATHEY AND JACK D. HODGDEN IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Civil Appeals for the Eighth Supreme Judicial District of Texas is reported in 430 S.W. 2d commencing at page 529. The opinion "reversed and remanded for trial" the summary judgment that had been rendered in a state trial court favoring Petitioners, (then plaintiffs), against Respondents Charles B. Athey and Jack D. Hodgden, who were then and now are defendants in the cause. The Supreme Court of Texas on March 5, 1969 declined to review the state court decision.

JURISDICTION

This Court does not have and therefore should not exercise jurisdiction hereof for the reasons:

1. The decision of the state court is an interlocutory judgment as between Petitioners and Respondents Athey and Hodgden. Being such, it is not subject to the review that is being asked for against such named Respondents.

2. The decision of the state court rests on non-federal grounds as between Petitioners and Respondents Athey and Hodgden.

QUESTIONS PRESENTED

1. Does this Court have jurisdiction?

2. Assuming the state court decisions as being "Final judgments or decrees" that "may be reviewed" by "writ of certiorari"; and that this Court will undertake to determine local laws: Did the Texas court properly determine and then apply the controlling Texas law?

STATEMENT OF THE CASE

The part of the court opinion that favors Respondents Athey and Hodgden, the part that Petitioners now ask the Supreme Court to review, remanded this case for a complete trial as between Petitioners and such named Respondents. The case was remanded for trial so that the issues could be decided with a jury trial that had started on January 11, 1967 when a jury later discharged was regularly selected and empaneled to decide the fact issues

that were then regarded as being in existence as between Petitioners and the Respondents last named.

The case that the state court decided needs be tried by a jury was filed February 28, 1966 (State Record Transcript, p. 48) when Petitioners, all residents of Oklahoma (excepting one whose residence was in California) "individually and as heirs of Myrtle Belveal, deceased, Ida Oberg, deceased, and Milda Belveal, deceased" presented their original petition in a Texas state court complaining against Respondents Athey and Hodgden (who also lived in Oklahoma, Tr. p. 2). The suit likewise was against a Respondent sued as "Socony Mobil Oil Company" a New York corporation. J. K. Brim, Jr., a Texas resident against whom no relief is sought in this Court or was sought in the state court appeal, also was named as a defendant in the state trial court. The suit was filed and was then answered as a case that involved title to Texas lands. The case, as filed, was considered to be a case controlled by Texas rules of law and by that state's Rules of Civil Procedure. The prayer of Petitioners' petition then filed was for "judgment for title and possession of their property in Pecos County, Texas, and interest of plaintiffs therein as described in the deeds attached hereto as Exhibits 'E', 'F', 'G', 'H', 'I', 'J', and 'K' with writ of possession * * *" (Tr. p. 20). The seven recorded deeds that were copied to be a part of "Plaintiffs' Original Petition" are also shown into this record as the Exhibits E-K (Tr. pp. 648-661) that were attached to and thereby included to be a part of Plaintiffs' Fourth Amended Petition (Tr. p. 580) on which Petitioners have dependance in this Court. Respondent Athey was the

Grantee named in each of the above referred to deeds. These deeds are the "set" of "Texas forms" that are referred to in the Court of Civil Appeals opinion (p. 538 (8)). Such deeds were executed, acknowledged and delivered soon after the delivery of the seven deeds of the identical Grantors which first executed and delivered deeds the Court of Civil Appeals has referred to "on 'Oklahoma forms'," which said deeds each bear the "Made" date "29th day of March, A.D. 1962". Those deeds were the ones that had been prepared to accompany and that are referred to in and that did accompany the Stickelber letters of March 29, 1962 that Petitioners have shown as "Exhibit D" attached to their first (Tr. p 34) and fourth (Tr. p 647) petitions filed in this cause. Respondent Athey paid $105,000.00 out of his own funds for the above referred to fourteen deeds. The day of payment, how made and paid by him is noted on the picture copies of the "Oklahoma Forms" of deeds that are pictured at pages 15-21 of the Appellant's Brief that Respondent Jack D. Hodgden filed in the Texas Court of Civil Appeals. The said deeds are further identified into the record of this case through the depositions of Petitioners Marion J. Belveal (Cook transcription, pp. 59-60, 66-68); of Mrs Branom (pp. 81, 93, 95, 98); of Dudley Branom (p. 18) and of Will Wyler (pp. 6-7). The decedents hereinabove named, (Mrs. Myrtle Belveal, Mrs. Ida Belveal Oberg and Mrs. Milda Belveal Wyler) in their respective lifetimes made no attack whatever against the deeds that they respectively delivered and for which delivery each received a $15,000.00 cash payment.

The interests in lands that were conveyed to Respondent Charles B. Athey by the above referred to deeds, fourteen in number, were interests in lands that Frank M. Belveal and his wife, Myrtle G. Belveal acquired, as community property, through a purchase that was made in the late 1920's. Mr. Frank M. Belveal died intestate, leaving his wife and all of his children surviving him. After the foregoing fourteen deeds of this case were executed by Mrs. Belveal as a surviving wife and by all of the Belveal children, Mrs. Myrtle G. Belveal, the mother, died intestate. Mrs. Ida Belveal Oberg, a childless daughter, also died, a widow. Mrs. Milda Belveal Wyler, also a daughter, died intestate leaving her husband, Petitioner Will Wyler, and two children, Petitioners Ernest Wyler and Eldabel McKenzie (and her husband) surviving her. In the Court of Civil Appeals opinion that Petitioners here attack it was held and stated:

> "(2, 3) Plaintiffs pleaded and admitted the execution and delivery of the deeds, their acceptance and retention of the consideration, and the present posession of the land by the defendants". (p 532).

The Court of Civil Appeals decision also found and stated that the Texas forms of deeds (Petitioners' Exhibits E through K above referred to), "were executed and delivered", "About a week after the delivery" of the Oklahoma forms of deeds that are pictured in Respondent Hodgden's Appellant's Brief in the Court of Civil Appeals at pages 15-21 thereof.

Petitioners started this litigation with a 47 page "Original Petition" (Tr. pp 2-48). Respondents Athey and Hodgden answered the suit in a way that was called for by the Texas

Rules of Civil Procedure adopted by the Supreme Court of Texas in the early 1940's. Respondent Athey, under those rules, presented his plea of abatement to the trial court and asserted that there was an absence of a necessary party to this cause. (Tr. pp. 438-441). The Court of Civil Appeals opinion sustained Respondent Athey's contention, stating that the trial court judgment that was "reversed and remanded for trial" was "also erroneous in that there is an absence of necessary parties, which absence was raised by pleas to abate and was not cured * * *" (9) p. 534). Respondent Athey also answered with a formal plea of "not guilty" (Para. 6, Tr. p. 448) in a way provided by Rule 788 of the Texas Rules of Civil Procedure adopted by the Texas Supreme Court. Respondent Athey further pleaded 26 pages of defensive matters that, among other things, asserted that the price and sum of money ($105,000.00) that was paid for the above referred to conveyances, fourteen in number, represented "The price and sums of money * * * that the said Grantors of two sets of deeds and plaintiffs themselves asked for their said conveyances and for the sale of interest in the properties that they made" (Tr. p. 449). The price that was paid was alleged as being "the reasonable April, 1962 price and value of said property and interest in properties that the plaintiffs and the said Grantor had and held." (Tr. p. 449). Respondent Athey also plead that there was nothing wrong with the conveyances that Petitioners seek to set aside. He also said that the price he paid was not stated by him or by Respondent Hodgden but instead "was the price that was first determined and then stated" by the plaintiffs and by the Grantors (Tr. p. 449).

The deposition proof that was before the Court of Civil Appeals and also before the trial judge, disclosed that those who executed and delivered the deeds of this case, finally decided to accept the price of $105,000.00 which they asked, during the time of a meeting in Enid, Oklahoma, during which meeting a long distance telephone call from Texas became received by Petitioner Marion J. Belveal. This call from a prospective buyer brought an offer to buy and pay for on basis of payment of "$400.00 per acre after they examined title" (Petitioner Marion J. Belveal's deposition, Cook transcription, p. 118). Please see the documentation of that call as such is stated at page 148 of the "Appellant's Brief" that Respondent Athey filed in the Court of Civil Appeals; also the documentation concerning such call as such appears at pages 34-36 of Respondent Hodgden's Appellant's Brief that was filed in that Court.

Respondent Athey specially denied in his pleading that there was a confidential or fiduciary relationship between him and Petitioners or the Grantors in the deeds that were delivered to him. He plead that he was under no duty nor obligation to Petitioners in any of the respects that Petitioners then claimed or now claim. He denied improper conduct concerning Petitioners or his Grantors. He plead laches, estoppel, the doctrine of stale demand, Texas land and other limitation statutes and the other of the defenses that are commented upon in the Court of Civil Appeals opinion. (Tr. pp. 448-474).

Respondent Athey's grandfather bought an undivided 2/7ths interest in the lands of this suit in the 1920's in the

transaction in which Frank M. Belveal and his wife purchased the interest in lands that Mrs. Belveal and her children conveyed in 1962 by the fourteen deeds that are above referred to. The interest in land that Respondent Athey's grandfather bought, descended to Respondent Athey's father in 1948. Part of the interest that Respondent Athey's father acquired later came to Respondent Athey under th probate of his father's will in 1959 (Please see the "Summary" statement that appears in Respondent Athey's brief in the Court of Civil Appeals at pp. 27-32). The May, 1961 extension of lease agreement that Respondent Athey executed in favor of Respondent Mobil was an agreement concerning lands in which Respondent then owned and held personal interest. Respondent Athey and those who delivered the fourteen 1962 deeds of this case were tenants in common during the negotiations for and the completion of the sales of interest that were then made. But such tenant in common relationship did not make Respondent a fiduciary concerning the properties in which Petitioners had interest before the delivery of the fourteen deeds. 15 Tex. Jur. 2d, Para. 8, 14, pp. 165, 175; 86 CJS Para. 71, p. 463.

Respondent Hodgden answered Petitioners' state court suit with a "not guilty" answer (Tr. p. 391) and specially plead in Paragraph 7 of such answer that Petitioner "Marion J. Belveal, came to him about selling the interest that he and his brothers and sisters sold in the land in Pecos County, Texas, that is involved by this suit. He says that the said Marion J. Belveal advised him that he and those who signed the deeds of this case would sell and convey their said interest

..... for what was to be a total consideration of $105,000.00 for all the interest that the heirs at law of Frank G. Belveal then had in said land. Before the time when the said Marion J. Belveal came to Jack D. Hodgden, those who then were the heirs at law of the above referred to Frank G. Belveal, had declined or had not accepted the $89,250.00 offer that M. C. Stickelber's letter of March 29, 1962 shown by Exhibit "D" of plaintiffs' pleading, had made for their said interests. Those who delivered the deeds that are sought to be cancelled, among themselves, had decided they wanted more money for their property than M. C. Stickelber had offered. They decided upon the price at which they would sell their respective interests. This price was stated to Jack D. Hodgden or Charles B. Athey or J. K. Brim, Jr. who determined upon the price in dollars for which a sale would be made and was made." (Tr. pp. 392-393). Respondent Hodgden also alleged in his answer that the price that was asked for and then was paid to Grantors for their deeds was a price "that then equaled, if it did not then exceed, the cash market value and price for like interest in land in the same area of Pecos County, Texas." (Para. 9, Tr. p. 394). Respondent Hodgden adopted parts of the answer that Respondent Athey had filed (Tr. p. 401) and affirmatively alleged that Respondent Hodgden had done nothing wrong and that "plaintiffs are entitled to no recovery" as against him (Tr. p. 400). Respondent Hodgden had no connection whatever with the Texas land that this suit involves or with Petitioners until at a time in 1962 when Respondent Athey and defendant Brim commissioned him to see if stock of General Royalty Corporation, a company with which

neither Athey, Brim or Hodgden or Petitioners than had connection, could be bought. Respondent Hodgden, under that commission, bought 119 shares of General Royalty's 2900 shares of stock for the equal benefit of Respondents Athey and Hodgden and defendant Brim. This purchase was made under the terms of the written agreement of date March 23, 1962 that is shown by Exhibit "D" attached to Petitioners' Fourth Amended Petition (Record Tr. p. 647) that was filed January 25, 1967 (Tr. p. 1010).

Petitioners' suit filed February 28, 1966 was brought to actual trial in January, 1967. On January 11, 1967, a jury was selected and empanelled to decide the many fact issues of the case (Tr. pp. 578, 579). That jury was then released to return into open court on the Monday that was to follow. On that Monday, the parties again appeared to start the trial of the case to completion. But another postponement in trial was then announced by the presiding trial judge. On January 25, 1967, with the trial jury still standing by but waiting, Petitioners presented and then filed a 291 page "Fourth Amended Petition" (Tr. pp. 589-871). The same day Petitioners filed the first and only motion for summary judgment that they made against Respondents Athey and Hodgden. This motion for summary judgment carried form of verification from but one Petitioner Marion J. Belveal (Tr. p. 978). Such motion for summary judgment was then answered under oath by both Respondents Athey and Hodgden (Tr. pp. 1011, 1042). Neither of such Respondents filed a motion for summary judgment as against Petitioners. They were content to stand on their answers asserting then

and now that there were and are fact issues in this case that need be decided by a jury (Tr. pp. 1011-1020; 1042-1050). March 30, 1967, the presiding judge of the state district court discharged the jury that had been chosen for this case more than two months before, and on that day a twenty page judgment was rendered (Tr. pp. 1221-1224) in Petitioners' favor. That judgment "set aside, voided and held for naught" (Tr. p. 1224) the recorded deeds which are brought forward as Exhibits "E-K" attached to Petitioners' pleadings. That judgment directed Respondents to execute deeds "containing special warranties". The reversed judgment also named a Respondent to execute and deliver a deed to "the Clerk of the Court" (Tr. p. 1239). Appeal was perfected by Respondents Athey and Hodgden from all parts of the judgment that was against them (Tr. pp. 1263-1264). Request was made for a statement from the trial judge of an amount that would be required of Respondents Athey and Hodgden as a supersedeas bond. There was no response to this request (Tr. p. 1200). An appeal bond was then filed by them (Tr. pp. 1263-1264), and their appeal was perfected. The Texas Court of Civil Appeals reversed the order that had granted Petitioners' motion for summary judgment against Respondents Athey and Hodgden. On June 12, 1968, the Texas appellate court "remanded for trial" the case whose trial had started in 1967. The Court of Civil Appeals opinion decided questions of local land and procedural law as between Petitioners and Respondents Athey and Hodgden. As will be observed from a reading of the opinion that is under attack in this Court, no mention was made of the validity of a treaty or statute

of the United States or of a ground that was repugnant to the Constitution, treaties, statutes or authority of the United States.

ARGUMENT

Jurisdiction:

The statute (28 USCA 1257) provides that "Final judgments or decrees rendered by the highest court of a state in which a decision may be had, may be reviewed by the Supreme Court", "By writ of certiorari" in the instances enumerated in Section (3) of such statute. We respectfully submit that the state court judgment in this case that remands this case "for trial" as between Petitioners and the above named Respondents is an interlocutory judgment and not a final judgment or decree or one that is reviewable under the certiorari statute and this Court's rules with reference to the same. *Houston v. Moore* (1818) 3 Wheat. (U.S.) 433, 4 L. Ed. 428; *Urie v. Thompson*, (1949) 337 U.S. 163, 197, 93 L. Ed. 1282, 1293 and Annotations 89 L. Ed. 1186, ex. p. 1188 and 97 L. Ed. ex. p. 208 and 212.

The Texas law was properly determined and then aptly applied:

Texas cases are cited by the Court of Civil Appeals opinion that "remanded for trial" the case that exists between

Petitioners and Respondents Athey and Hodgden. In Texas the law is as was stated by the opinion of the Court of Civil Appeals. The way that law should be applied was properly stated by the opinion under attack and was stated by the Supreme Court of Texas in *Great American Reserve Ins. Co. v. San Antonio Plumbing Sup. Co.* (Tex. Sup. Ct. 1965) 391 S.W. 2d 41 that is cited as an authority at page 532 of the Texas opinion that was handed down. The *Great American Reserve Ins. Co.* case is cited by Petitioners and quoted from in an admiring way at page 26 of the Petition for Certiorari that is being answered. Admittedly the trial court judgment that was "reversed and remanded for trial" was a "summary judgment" as between Petitioners and Respondents Athey and Hodgden. Being such, the trial judge, under the *Great American Reserve Ins. Co.* opinion, was deprived of lawful right to resolve questions of probative value of the conflicting deposition testimony that was before this Court. The judge who granted the summary judgment against Respondents Athey and Hodgden was without lawful authority to resolve the summary judgment depositions and the affidavit testimony that was offered to him in a way that was favorable to Petitioners and against such Respondents Athey and Hodgden. This was stated in the *Great American Reserve Ins. Co.* case and by the other Texas Supreme Court cases that that opinion cites. The said case decided by the Supreme Court of Texas states

that all doubts as to matters of law in this case were to be resolved in favor of Respondents Athey and Hodgden. The said case also decides that no such doubts were to be resolved in favor of Petitioners. The *Great American Reserve Ins. Co.* case and the Supreme Court cases to which that case refers unmistakably state that the evidence in the record was all to be viewed in the light "most favorable" to Respondents Athey and Hodgden. The deposition evidence that favored Respondents Athey and Hodgden was required to be "accepted as true" under Texas law and Texas authorities, including *Cowden v. Bell*, (Tex. Sup. Ct. 1957) 300 S.W. 2d 286, a case that is referred to in the *Great American Reserve Ins. Co.* case. Stated another way and as was stated by the Court of Civil Appeals opinion, under *Great American Reserve Ins. Co. v. San Antonio Plumbing Sup. Co.* (Tex. Sup. Ct. 1965) 391 S.W. 2d 41, Petitioners' motion for summary judgment against Respondents Athey and Hodgden should have been denied in the state court.

The state court was in its proper field in determining as that court did that no treaty or statute of the United States or any federal matter was drawn in question by what that court decided. It is respectfully submitted that the Court of Civil Appeals opinion is right and is not subject to be reviewed by this Court.

CONCLUSION

The Texas court properly handled and properly remanded this case for a trial on the merits. Accordingly, it is respectfully submitted that the Petition for Writ of Certiorari should be dismissed or be denied.

Respectfully submitted,

E. B. MITCHELL, JR.,
P. O. Box 1029,
Enid, Oklahoma 73701,

GERALD FITZ-GEARLD,
JAMES FITZ-GERALD, III,

WILLIAM L. KERR,
P. O. Drawer 511,
Midland, Texas 79701,
Attorneys for Respondents,
Charles B. Athey and
Jack D. Hodgden.

Of Counsel:
MITCHELL, MITCHELL,
DECLERCK & COX,
Security National Bank Building,
Enid, Oklahoma 73701,
KERR, FITZ-GERALD & KERR,
111 Midland Tower Building,
Midland, Texas 79701.

CERTIFICATE OF SERVICE

Copy of the foregoing was deposited in the United States mail at Midland, Texas in a properly stamped envelope addressed to counsel for Petitioners, viz: John J. Watts, Esq., at his post office address, P. O. Box 1031, Odessa, Texas; John G. Patterson, Esq., at his post office address 2323 Houston Natural Gas Building, Houston, Texas; and Verne F. Knickerbocker, Esq., at his post office address, P. O. Box 1132, Midland, Texas, this the 27 day of June, 1969.

THIS I CERTIFY.

William L. Kerr

William L. Kerr
111 Midland Tower Building,
P. O. Drawer 511,
Midland, Texas,
Counsel for Respondents,
Charles B. Athey and
Jack D. Hodgden

LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
JUN 26 1969
JOHN F. DAVIS, CLERK

In the

Supreme Court of the United States

OCTOBER TERM, [redacted] 1969

No. 168 [redacted]

MARION J. BELVEAL, ET AL.,
Petitioners,

v.

SOCONY MOBIL OIL CORPORATION,
CHARLES B. ATHEY, AND JACK D. HODGEN,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

WM. B. BROWDER, JR.,
JACK T. AKIN,
TOM SEALY,
RUSH MOODY, JR.,
P. O. Box 670,
Midland, Texas,
Attorneys for Respondent, Mobil Oil Corporation.

Of Counsel:
STUBBEMAN, MCRAE,
SEALY & LAUGHLIN,
P. O. Box 670,
Midland, Texas.

THE WARLICK PRESS DIVISION, STECK-WARLICK CO.
P. O. BOX 10543 — 1455 ROUND TABLE DRIVE — DALLAS — ME 1-3130

TABLE OF CONTENTS

	Page
Index of Authorities	iii
Opinions Below	1
Jurisdiction	2
Reasons for Denial of the Writ	
I. Substantive Due Process Was Afforded Petitioners	9
A. The State Court Correctly Validated Mobil's Leasehold Estate	
1. The Record Facts	9
2. Analysis of the Facts and the Law	
a. Fraud or Conspiracy	
1. There is no evidence to support petitioners' claim	14
2. The claim comes too late	17
b. Athey's Authority to give Mobil a Lease	
1. Specific authority existed	23
2. Estoppel and Ratification	26
3. Statute of Limitations	41
3. Conclusion — Mobil's Leasehold Estate	43
B. The State Court Correctly Overturned Petitioners' Summary Judgment to the Deeded Lands	
1. The Record Facts	45
2. Analysis of the Facts and the Law	
a. The Mobil-Brim Relationship	49
b. Mobil's Status as a Bona Fide Purchaser	62

TABLE OF CONTENTS — (Continued)

Page

3. Conclusion — Mobil's Deeded Lands 70

II. Procedural Due Process Was Afforded Petitioners

A. Petitioners' Claims Re-examined 71

B. The Record Facts 71

C. Conclusion 73

III. No Constitutional Rights Were Abridged

A. Petitioners' Claims Re-examined 74

B. Analysis of the State Court Judgment 74

C. Conclusion 81

IV. Conclusion 81

Certificate of Service 82

Appendix A-1

Opinion Below

Page

Cases

Ackerson v. Farm & Home Sav. & Loan Asso., 77 S.W. 2d 559 60

American Nat. Bank v. Miller, 229 U.S. 517, 57 L. Ed. 1310 61

Anderson v. General American Life Ins. Co., 141 F. 2d 898, 323 U.S. 789, 89 L. Ed. 637 61

Angel v. Bullington, 1947, 67 S. Ct. 657, 330 U.S. 183, 91 L. Ed. 832 3

Ball v. Yowell, 222 S.W. 2d 277 28

Barnsdall v. O'Day, 134 F. 828 61

Barnsdall Oil Co. v. Willis, 153 F. 2d 784 57

Baxter v. Yarborough, 46 Tex. 231 24

Bearden v. Texas Co., 41 S.W. 2d 447, 60 S.W. 2d 1031 27

Binder v. Millikin, 201 S.W. 239 60

Bishop v. United States, 266 F. 2d 657 57

Brady v. Garrett, 66 S.W. 2d 502 60

Buchanan v. Sinclair Oil & Gas Co., 218 F. 2d 436 28

Bunton v. Palm, 9 S.W. 182 68

Campbell v. Crowley, 56 S.W. 373 60

Cartwright v. Minton, 318 S.W. 2d 449 43

Condor Petroleum Co. v. Greene, 164 S.W. 2d 713 39

Cooper v. Ford, 69 S.W. 487 60

Cooper v. Lee, 12 S.W. 483 43

Coronado-Inglenook Land & Development Co. v. Black, 96 S.W. 2d 727 61

Cotton v. Rand, 51 S.W. 835, 53 S.W. 343 58

Deaton v. Rush, 252 S.W. 1025 43

	Page
Doty v. Barnard, 47 S.W. 712	35, 36
Equitable Life Assur. Soc. v. Brown, 1902, 23 S. Ct. 123, 187 U.S. 308, 47 L. Ed. 190	3
Finney v. Finney, 164 S.W. 2d 263	43
First Texas Joint Stock Land Bank v. Chapman, 48 S.W. 2d 651	69
Fitchett v. Bustamente, 329 S.W. 2d 920	43
Fitz-Gerald v. Hull, 150 Tex. 39, 237 S.W. 2d 256	56, 57
Fleming v. Ashcroft, 175 S.W. 2d 401	62
Frost v. Stanolind Oil & Gas Co., 307 S.W. 2d 136, writ ref.	81
Gaines v. Hamman, 163 Tex. 618, 358 S.W. 2d 557	57
Gareis v. Gordon, 243 S.W. 2d 259	43
Garrison v. Crowell, 67 Tex. 626, 4 S.W. 69	63
Gulf Production Co. v. Continental Oil Co., 164 S.W. 2d 488	28
Hager v. Stakes, 294 S.W. 835	25
Harrington v. McFarland, 21 S.W. 116	60
Harvey v. Humphreys, 178 S.W. 2d 733	63
Hill v. Carr, 307 S.W. 2d 828	80
Holmes v. Cummings, 71 F. 2d 364	22
Holmes v. Uvalde Nat. Bank, 222 S.W. 640	58
Horst v. Lightfoot, 132 S.W. 761	36
Houston Oil Company v. Niles, 255 S.W. 604	63
Humble Oil & Refining Co. v. Harrison, 205 S.W. 2d 355	28
Humphreys v. Standard Sav. & Loan Assoc., 80 S.W. 2d 438	60

	Page
Hunter v. Shell Oil Co., 198 F. 2d 485	53
Jones v. Robb, 80 S.W. 395	62
LaBrie v. Cartwright, 118 S.W. 785	64, 66
Lea v. Iron Belt Mercantile Co., 42 So. 415	61
Leach v. Brown, 251 S.W. 2d 553, writ ref.	81
Leopard v. Stanolind Oil Co., 220 S.W. 2d 259	28
Link v. Page, 72 Tex. 592, 10 S.W. 699	24
Loeffler v. King, 236 S.W. 2d 772	36
Lowe v. Ragland, 297 S.W. 2d 668	36
McCoy v. Texon Royalty Co., 124 S.W. 2d 877	28
McMullen Oil & Royalty Co. v. Korzekwa, 344 S.W. 2d 525	43
McMullen Oil & Royalty Co. v. Lyssy, 353 S.W. 2d 311	43
Meinhard v. Salmon, 249 N.Y. 458	56
Middleton v. Johnston, 110 S.W. 789	63
Minchew v. Morris, 241 S.W. 215	17, 18, 20, 42
Mitchell v. Simms, 63 S.W. 2d 371	28
Mott v. Nardo, 166 P. 2d 37	61
Murphy v. Johnson, 54 S.W. 2d 158	20
Mutual Assur. Co. v. Norwich Sav. Soc., 24 A. 2d 477	61
Myers v. Crenshaw, 116 S.W. 2d 1125	28
Newco Land Co. v. Martin 213 S.W. 2d 504 (Mo.)	61
Nissen v. Nissen Trampoline Co., 39 N.W. 2d 92	61
Nye v. Lovelace, 228 F. 2d 599	57
Obertholtzer v. Myles, 147 S.W. 2d 569	37

	Page
Omohundro v. Matthews, 161 Tex. 367, 341 S.W. 2d 401	57
Parkersburg Rig & Reel Co. v. Golden, 277 S.W. 1106	60
Peterson v. Holland, 189 S.W. 2d 94	60
Pool v. Unknown Heirs of Foster, 49 S.W. 923	24
Pratt v. Shell Petroleum Corporation, 100 F. 2d 833	55
Pure Oil Company v. Swindall, 58 S.W. 2d 7	62
Reardon v. Mutual Life Ins. Co., 86 A. 2d 570	61
Reed v. Hester, 44 S.W. 2d 1107	60
Richardson v. Wesley, 1 S.W. 2d 1098	60
Royal Petroleum Corporation v. Dennis, 332 S.W. 2d 313 (S. Ct.)	81
Schneider v. Sellers, 61 S.W. 541	62
Scripture v. Scottish-American Mortgage Co., 49 S.W. 644	60
Sharpe v. Landowners Oil Ass'n, 127 Tex. 147, 92 S.W. 2d 435	79, 81
Smith v. Bolin, 153 Tex. 486, 271 S.W. 2d 93	57
Stephens County v. Mid-Kansas Oil & Gas Co., 254 S.W. 290	25
Sydnor v. Roberts, 13 Tex. 598	62
T. P. Coal & Oil Co. v. Belcher, 265 S.W. 1081	60
Tasher v. Foster Lumber Company, 205 S.W. 2d 665	63
Teagarden v. Godley Lumber Company, 154 S.W. 973	63, 66
Texas Co. v. McMillan, 13 F. Supp. 407	28
Texas & Pacific Coal & Oil Co. v. Kirtley, 288 S.W. 619	36

Page

U. S. F. & G. Co. v. San Diego State Bank, 155 S.W. 2d 411 60

United States v. Bowen, 290 F. 2d 40 57

Veal v. Thomason, 138 Tex. 341, 159 S.W. 2d 472 80

Vincennes Savings and Loan Asso. v. St. John, 12 N.E. 2d 127 61

Wilson v. Meredith, 268 S.W. 2d 511 62

Woteshek v. Neuman, 138 N.W. 1000 61

Zeigler v. Federal Land Bank of Houston, 86 S.W. 2d 864 60

Rules

Texas Rule 166A (source: Rule 56, Fed. R. Civ. P.) 7

Texas Rule 170 (source: Fed. Rule 37) 7

Statutes

Article 5529, Texas Revised Civil Statutes 43

Texts

3 Am. Jur. 2d, Agency, Sec. 282 61

37 C.J.S., Fraud, Sec. 27, p. 269 61

Summers on Oil and Gas, Vol. II, ch. 9, 10, 11 25

7 Texas Law Review, Walker, *The Nature of the Property Interests Created by an Oil and Gas Lease in Texas*, pp. 555-562 25

In the

Supreme Court of the United States

OCTOBER TERM, 1968

No. 1452

MARION J. BELVEAL, ET AL.,

Petitioners,

v.

SOCONY MOBIL OIL CORPORATION, CHARLES B. ATHEY, AND JACK D. HODGEN,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

To the Honorable Supreme Court of the United States:

Comes now Mobil Oil Corporation, one of the respondents herein, to urge that this cause should not be reviewed by this Honorable Court.

OPINIONS BELOW

The State court judgment under attack is reflected in a written opinion of the Court of Civil Appeals, Eighth Supreme Judicial District of Texas entered June 12, 1968. The opinion is reported at 430 S.W. 2d 529. Peti-

tioners have appended only a portion of the opinion to the Petition (A-1) and respondent Mobile now offers the entirety of the opinion to this Honorable Court for its consideration as Exhibit A to this Brief.

The Supreme Court of Texas has reviewed this opinion, and the record in this case, and has refused to disturb the Court of Civil Appeals judgment.

JURISDICTION

Some degree of prescience is necessary to understand petitioners' complaints, but as we grasp them, the petition urges:

> 1. Substantive due process has been denied; petitioners' proof was such that no reasonable court could reject it and hold with respondents. (Petition, pp. 6, 7, "Questions Presented" Nos. 11, 12, 13)
>
> 2. Procedural due process is lacking when a litigant contumaciously ignores a trial court discovery order, thereby denying his adversary the opportunity of preparing his case. (Petition, pp. 3-5, "Questions Presented" Nos. 1, 2, 3, 4, 6, 7)
>
> 3. Constitutional rights are abridged when a State court litigant is held to the requirements of State law concerning forms of action, parties, and quantum of proof. (Petition, pp. 4-6, "Questions Presented" Nos. 5, 8, 9, 10)

These claims are without merit. This is an action involving title to private lands, decided by State law. No substantial federal questions are present. We believe this Honorable Court will determine that jurisdiction should

not be accepted under *Angel v. Bullington*, 1947, 67 S. Ct. 657, 330 U.S. 183, 91 L. Ed. 832; *Equitable Life Assur. Soc. v. Brown*, 1902, 23 S. Ct. 123, 187 U.S. 308, 47 L. Ed. 190, and related decisions.

REASONS FOR DENIAL OF THE WRIT

(Statement of Facts, Argument and Authorities)

It will be necessary to correct the inaccuracies and omissions in petitioners' statement of the case in order to disclose the reasons why this cause should not be reviewed by this Honorable Court.

We proposed to discuss petitioners' claims in order. Under each area of discussion we will first refer to the record facts omitted by petitioners, and then present our argument and authorities. According, this brief will present

I. ***Substantive Due Process Was Afforded Petitioners***

A. The State Court Correctly Validated Mobil's Leasehold Estate.

1. The Record Facts

2. Analysis of the Facts and the Law

a. Fraud or Conspiracy

1. There is no evidence to support petitioners' claims

2. The claim comes too late

b. Athey's Authority to give Mobil a lease

1. Specific authority existed

2. Estoppel and Ratifications
3. Statute of Limitations

3. Conclusion — Mobil's Leasehold Estate

B. The State Court Correctly Overturned Petitioners' Summary Judgment to the Deeded Lands

1. The Recorded Facts
2. Analysis of the Facts and the Law
   a. The Mobil-Brim Relationship
   b. Mobil's Status as a Bona Fide Purchaser
3. Conclusion — Mobil's Deeded Lands

II. ***Procedural Due Process Was Afforded Petitioners***

A. Petitioners' Claims Re-examined

B. The Record Facts

C. Conclusion

III. ***No Constitutional Rights Were Abridged***

A. Petitioners' Claims Re-examined

B. Analysis of the State Court Judgment

C. Conclusion

IV. ***Conclusion***

* * * * *

To assist the Court in its understanding of the procedural posture of this case at this time, and since petitioners never quite get around to explaining what the case truly involves, a brief summary may be helpful.

Marion J. Belveal and other members of the Belveal family[1] filed suit in the District Court of Pecos County, Texas, against Socony Mobil Oil Company, Inc. (now Mobil Oil Corporation), Charles B. Athey, Jack D. Hodgden and J. K. Brim, asserting these claims:

> 1. Athey, an agent selected by the Belveals, violated his fiduciary duties to his principals, and committed fraud.
>
> 2. Athey's fraud was aided and furthered by the conspiratorial acts and conduct of Jack D. Hodgden and J. K. Brim.
>
> 3. J. K. Brim was an employee of Mobil Oil Corporation, and, therefore, Mobil is legally responsible for Brim's conduct.

The plaintiffs claimed that the effect of Athey's alleged fraud, in which Hodgden and Brim participated, was to deprive them of their undivided interest in certain lands and minerals located in Pecos County; specifically, they claimed they were defrauded of a 1/7 interest in Sections 44, 52 and 56, Block OW, Section 18, Block 143, and part of Section 15, Block 48, in Pecos County, Texas.

The plaintiffs' interest in the lands in question was leased for oil and gas exploration and development long prior to the conduct complained of by the plaintiffs; however, plaintiffs also claimed that their agent Athey wrongfully executed an "Extension of Lease" agreement in fraud of their rights and that Mobil was responsible for Athey's wrong.

---

[1] Petitioners will be referred to as "the Belveals" or "the plaintiffs" for ease of understanding. Respondents will be identified by name.

The relief sought by the plaintiffs in the trial court was for:

(1) Cancellation of each of seven deeds running from the plaintiffs to Athey;

(2) Cancellation of all deeds and conveyances out of Athey, with restoration of the properties to the plaintiffs;

(3) An accounting as to all profits attributable to the property covered by these deeds;

(4) Cancellation of the "Extension of Lease" agreement;

(5) An accounting as to all rents and revenues attributable to the property covered by this agreement; and

(6) The imposition of a constructive trust on any interest owned by any defendant in the lands conveyed by the Belveals to Athey.[2]

After depositions were taken and affidavits filed, the plaintiffs and Mobil each moved for summary judgment. After protracted hearings were held (proceedings which produced a transcript in excess of 1800 pages) the trial court held there to be no genuine issue of material fact and summary judgment for the plaintiffs was entered, thus denying all relief to the defendant Mobil. The trial court judgment, while not clear, can be interpreted to:

(1) Cancel the Belveal deeds to Athey covering undivided interests in the Pecos County property;

[2] The Belveals now claim this to be a principal objective in their suit. A detailed review of the 391 page Fourth Amended Petition reveals one reference to this theory, while theories of "fraud," "cancellation," "conspiracy," and "restoration of plaintiffs' property" are alleged in excess of one hundred times. Mobil will accept the Belveal claim that they *really* seek constructive trust relief in order to show that this does not affect the decision here.

(2) Order Athey, Hodgden and Mobil to execute deeds to convey to the Belveals various undivided interests in this property;

(3) Cancel the "Extension of Lease" agreement and declare the Belveal interests to be unleased as of March 20, 1962; and

(4) Order Athey, Hodgden and Mobil to "account to Plaintiffs" for moneys received attributable to the property covered by the canceled lease.

The trial court judgment was one of summary judgment, not default judgment as petitioners now pretend. That judgment was entered pursuant to Texas Rule 166A (which had Rule 56, Fed. R. Civ. P. as its source), and clearly was not a default judgment under Texas Rule 170 (source: Fed. Rule 37). The differences between a *summary judgment* and a *default judgment* are patent, and the State courts have summarily rejected — as we know this court will — petitioners' attempts to equate the two.

Mobil Oil Corporation and the respondents Athey and Hodgden each perfected separate appeals in order to seek reversal of the trial court summary judgment, with Mobil further seeking rendition of judgment, as between the Belveals and Mobil, denying all relief to the Belveals.

The Court of Civil Appeals, by unanimous opinion, reversed the plaintiffs' summary judgment and ordered:

(1) Remand for trial as between the Belveals, Athey and Hodgden;

(2) Remand for trial as between the Belveals and Mobil on Mobil's deeded property; and

(3) Rendition of judgment validating Mobil's oil and gas lease.

The partial remand and partial rendition by the Court of Civil Appeals was entirely proper. The case before that Court actually involved two separate and distinct causes of action asserted by the Belveals. The first, an action for (a) cancellation of seven 1962 deeds from the Belveals to Athey and (b) an accounting as to revenues derived from the property covered by the seven deeds, was set forth in plaintiffs' Original Petition, filed February 28, 1966 (Tr. 1-48), and was based upon the alleged fraud of Athey, Hodgden and Brim. The second, for (a) cancellation of a 1961 "Extension of Lease" agreement from Athey to Mobil, (b) declaration of the Belveal interests to be unleased for oil and gas purposes, and (c) an accounting as to revenues under the "Extension of Lease" agreement, was not asserted until the filing of plaintiffs' Second Amended Original Petition on August 23, 1966 (Tr. 126-148).

Mobil requested that the two cases be severed (Tr. 214), asserting that the two causes of action did not involve common issues of law or fact, and that the two did not arise from the same transaction or occurrence. The Belveals then filed their 391 page Fourth Amended Original Petition on January 25, 1967 (Tr. 580-971), claiming that the one element common to the two unrelated claims was the conspiratorial activity of J. K. Brim, a one-time Mobil employee;[3] and the court thereupon overruled Mobil's Motion to Sever (Tr. 1222).

[3] The first mention of any alleged conspiracy was in this Fourth Amended Original Petition of January, 1967.

The Court of Civil Appeals obviously agreed that the validity of Mobil's *lease* was established as a matter of law, but that trial on the merits was necessary on the *deeded land* controversy.

I SUBSTANTIVE DUE PROCESS WAS AFFORDED PETITIONERS

A. The State Court Correctly Validated Mobil's Leasehold Estate

1. The Record Facts

The developments, in chronological order, were as follows:

(a) On March 19, 1952, G. W. Athey, et al (the Belveals and others), lessors, executed and delivered to F. J. Ellyson, lessee, that certain oil, gas and minerals lease of such date, recorded in Volume 193, Page 368, Lease Records of Pecos County, Texas, covering Sections 44, 52 and 56, Block OW, T.T. Ry. Co. Survey, and Section 15, Block 48, Township 8, T&P Ry. Co. Survey, excepting the West 200 acres of the N/2 of said Section 15, all in Pecos County. (Ex. U, Fourth Petition, Tr. 598). The lease was assigned by Ellyson to Magnolia Petroleum Company, by assignment dated April 25, 1952, recorded in Volume 193, Page 378, Lease Records of Pecos County, Texas. (Ex. B, Mobil's Motion for Summary Judgment, Tr. 233.) Magnolia Petroleum Company was later merged into Socony Mobil Oil Company, Inc., and Mobil Oil Corporation has succeeded to the name and property of said Socony Mobil Oil Company, Inc. (Ex. C, Mobil's Motion for Summary Judgment, Tr. 235.)

(b) This lease has never been challenged by anyone—before or during this suit. Its validity is conceded. Delay rentals were paid to the Belveals, and the other lessors, and such payments were accepted by all lessors. (Affidavits of Carrington, Wright and Keller, Tr. 1159-1170; cf. with Fourth Petition, Tr. 580, where no claim of invalidity appears.)

(c) On August 22, 1960, the Belveals joined General Royalties Corporation and other persons and executed and delivered to Charles B. Athey a Power of Attorney, dated August 22, 1960, covering the above mentioned and referred to sections of land and also covering Section 18, Block 143, T. & St. L. RR Co. Survey, Pecos County, Texas. The Power of Attorney is of record in Volume 238, Page 65, Deed Records of Pecos County, Texas. (Ex. A, Fourth Petition, Tr. 634.)

(d) The validity of the Power of Attorney was not challenged by anyone — before or during this suit. To the contrary, the Belveals expressly plead and rely on the Power as being valid and subsisting at the times they claim were relevant to the suit. (Fourth Petition, par. 2p, Tr. 589-595.)

(e) On May 19, 1961, an instrument designated "Extension of Lease" was executed and delivered by Charles B. Athey, Individually and as Trustee and Attorney-in-Fact and Agent for Myrtle G. Belveal, et al., to Socony Mobil Oil Company, Inc., which instrument is recorded in Volume 292, Page 34, Lease Records, Pecos County, Texas, covering the same property described in the above

mentioned and referred to oil, gas and minerals lease. (Ex. L, Fourth Petition, Tr. 662.)

(f) For the execution and delivery to it of the "Extension of Lease," Mobil paid to Charles B. Athey and the other grantors and lessors the sum of $72,423.51, and said grantors received, accepted and retained such funds. (Affidavit of Wright, Tr. 1159; Fourth Petition, par. 27, Tr. 614.)

(g) After the extension, Mobil paid delay rentals to the Belveals' depository bank, which monies were received and retained by the Belveals. The delay rentals in 1962 were payable only under the extension agreement, not under the original lease. (Tr. 1164-1165.)

(h) During the year 1962, a well was commenced on Section 44, Block OW, for oil and gas and completed as a producing well in the early part of 1963. Other and additional wells have been drilled on the same lease premises since such time and completed as producing wells. In addition, a well has been commenced, drilled and completed on Section 18, Block 143. There has been continuous and uninterrupted operations for, and/or producing in paying quantities of, oil and/or gas to date on the lands under the terms and in accordance with the provisions of the above mentioned and referred to lease. (Affidavit of Wright, Tr. 1159.)

(i) The Belveals filed suit February 28, 1966, seeking to cancel certain deeds given by them to Athey, on the asserted ground of fraud by Athey, Brim and Hodgden. (First Petition, Tr. 2.)

(j) Not until Plaintiff's Second Amended Petition was filed on August 23, 1966, did the Belveals launch an attack on Mobil's producing lease, then attacking, for the first time, the Extension of Lease Agreement. (Tr. 266.) Fraud and conspiracy in the procurement of said Lease Extension was asserted for the first time when plaintiffs later filed their Fourth Amended Original Petition on January 25, 1967. (Tr. 580-1010.) The Belveals themselves assert that they learned of the fraud claimed by them in connection with the Extension of Lease Agreement in November, 1965. (Fourth Petition, par. 30a, Tr. 624.) During the interval of time from the Belveals' alleged discovery of fraud (November, 1965) until the Belveals first asserted a right of cancellation of Mobil's lease (August 23, 1966) and fraud and conspiracy in connection therewith (January 25, 1967), oil and gas were continually produced by Mobil, and Mobil received and disbursed funds attributable to this production from this lease. During this interval of time Mobil continually operated and developed the lease at tremendous expense. (Mobil's Second Motion for Summary Judgment, supported by affidavits, Tr. 1131; Mobil's Answer to Plaintiff's Motion, supported by affidavits, Tr. 1082.)

Mobil recognizes that:

(1) There is some evidence in this record tending to show that Athey, Brim and a lease broker named Hodgden reached agreement in the *spring of 1962* (at *least* eight months *after* the lease agreement was made) that

they would jointly acquire, in Athey's name, an undivided 1/7 fee interest owned by the Belveals. This Belveal interest was already under lease to Mobil when the agreement was made.

(2) There is evidence in this record that in *March, 1962* (ten months *after* the lease agreement) the Belveals executed seven deeds covering their interests, for which they received $105,000.00. The deeds were signed in blank, but when they were recorded, Athey appeared as grantee. This suit was commenced upon the Belveals' claim that they were defrauded in this *deed* transaction.

As explained before, the Belveals claim that the facts in this record compelled a plaintiff's summary judgment canceling Mobil's lease because:

1. The extension agreement was part of a Mobil-Athey conspiracy to defraud the Belveals, *or*

2. Athey was without legal authority to bind the Belveals in the execution of the agreement.

(Fourth Petition, par. 27, Tr. 614; Belveal Motion for Summary Judgment against Mobil, par. III, Tr. 1060-1064.)

In response to the Belveal claims, Mobil demonstrated to the Court of Civil Appeals that:

1. There is no competent evidence which suggests (much less establishes) any fraud or conspiracy on the part of Mobil, Brim, Athey, Hodgden, or anyone else in connection with the execution and delivery of the *extension agreement*. Further, estoppel bars any such claims. In any event, the claims of fraud came too late for consideration by the court.

2. Athey's authority to execute and deliver the May, 1961 agreement exists as a matter of law, because:

(a) Athey had authority to lease, and the agreement is a lease;

(b) Athey had authority to lease, and he had authority to amend the lease;

(c) Regardless of actual authority in Athey, the Belveals ratified the acts of Athey and are estopped and barred by laches from asserting any want of authority by reason of their acceptance and retention of benefits acquired by them under the agreement;

3. In any event, the claim for cancellation for want of authority to execute the instrument is barred by the statute of limitations.

The Court of Civil Appeals rendered judgment on the lease controversy on the basis of this outline.

2. Analysis Of The Facts And The Law

a. Fraud or Conspiracy

(1) *Where is the evidence?*

At the outset of this case in the trial court, we believed that no citation of authority was necessary to establish so basic a proposition as that which requires one who alleges fraud and conspiracy to prove frauds and conspiracy conclusively before he is entitled to summary judgment.

The Court of Civil Appeals has re-affirmed that such a showing *is* necessary, and that the Belveals wholly failed to prove by affidavits, depositions or otherwise that any

one conspired to defraud the Belveals in securing the *lease extension agreement.*

Not contenting ourselves with so declaring, let us point out the record evidence which militates against any finding of fraud in this 1961 transaction:

(1) Mobil paid $73,423.51 for the agreement. (Tr. 1159-1160.) There is not even a hint of proof that this price was inadequate. All of the Belveals deposed that they received, accepted and retained their part of this money consideration.

(2) Mobil still had over ten months remaining on the primary term of its lease when the extension was obtained. Mobil did not need the extension to preserve its lease — it could have begun drilling operations and held the lease. Indeed Mobil *would have* done so had Mobil not been able to reach agreement with the Belveals (Tr. 1166-1170).

(3) Surely if Mobil, Athey, Brim and Hodgden — or any of them — sought to defraud the Belveals in the 1961 extension transaction the Court could reasonably expect to find some ulterior motive. But there is none. Athey gained nothing by giving the agreement. Brim gained nothing under the agreement (and in this transaction he had no side deals) nor did Hodgden. Mobil gained nothing, save a two year lease for which it had to pay over $72,000.00.

(4) The Athey-Brim transactions which resulted in the passage of legal title by deeds from the Belveals to Athey occurred in March, 1962, over ten months *after* the extension agreement was delivered. Brim did not become personally involved with Athey and Hodgden until no earlier than January, February or March of 1962, more than eight months *after* the extension agreement was delivered. Even Brim admits that his agreement with Athey to acquire the

Belveal properties was not reached until the spring of 1962. Where, then, is there unlawful concert of action in May, 1961, when the extension agreement was delivered?

We know that the Court will read diligently this record to ascertain the validity of the El Paso Court's holding that there is a total absence of evidence raising any issue of fraud or conspiracy with respect to the May, 1961, "Extension of Lease" agreement. We know this Court will readily discern from proper affidavits and exhibits and from depositions, that *the only evidence in this record which might conceivably raise an issue of fraud has to do with the 1962 deeds from the Belveals to Athey*, that is, the deeds which resulted from transactions occurring in their entirety during the calendar year 1962. We are confident also that the Court will realize that Brim's questionable acts were all committed in 1962, after he embarked on a course of self-dealing in derogation of his duties to Mobil.

In the Court of Civil Appeals, Mobil challenged the Belveals to show that Court, by specific record reference, any competent evidence that there was fraud or unlawful conspiracy involved in the negotiation, signing or delivery of, or in the payment for, the May 19, 1961 Extension of Lease Agreement.

The challenge was not met. The Belveal briefs remained silent. For this reason, we believe, rendition of judgment followed.

(2) *Fraud or conspiracy; the claim comes too late.*

But let us suppose for the moment that the Belveals could prove fraud if this case were remanded; even if they could so prove, would they be entitled to judgment cancelling Mobil's lease?

The answer must be that the Belveal claim of fraud with reference to the May, 1961 extension agreement comes too late. There is no more strict rule in Texas than that holding delay as a complete bar to actions for cancellation, where cancellation of an oil and gas lease is sought.

As we discuss the Belveal delay, we ask the Court to recall that the Belveals themselves allege they knew *all* of the facts they say prove fraud in November, 1965. (Tr. 624.) An action for cancellation of Mobil's lease was first asserted on August 23, 1966. (Tr. 266, 321.) The *admitted* delay is at least ten months or longer, without any inquiry as to whether the Belveals *should have* discovered the problem earlier.

This long delay is fatal to the Belveal case.

Texas courts have never condoned inaction such as is present here—when the result of the inaction is to allow a prospective litigant to speculate on the fluctuations in value of an oil and gas lease. Texas law condemns a delay of *two months* between the discovery of fraud and the inception of the action to cancel, it having been held that a two months' delay is an absolute bar to an action for cancellation because of fraud. We speak, of course, of *Minchew v. Morris*, 241 S.W. 215 (Tex. Civ. App.).

In the *Minchew* case, Morris bought an oil and gas lease from Minchew on January 16. In the negotiations Minchew made certain representations which induced Morris to buy. During February — one month later — Morris learned that Minchew had defrauded him, that the lease was not as represented. During February and March, Morris and Minchew corresponded and talked, but finally on April 16 (three months after the purchase, two months after the discovery of fraud) Morris was told that Minchew would not voluntarily rescind the purchase. Morris then took action.

On trial of Morris' fraud case against Minchew in which he sought cancellation of a note given to Minchew, rescission of the lease purchase and restoration of the parties to the status quo, Morris obtained the trial court judgment. The Court of Civil Appeals *reversed and rendered* solely because of Morris' *delay* in seeking cancellation and rescission. We quote at some length from the opinion by Judge Hamilton:

> "The most serious matter presented in this appeal is the question of laches invoked as a defense by appellant. We take it as well established that the doctrine of laches is to be applied with unusual strictness and severity to contracts relating to the sale of oil leases against the person seeking rescission. This is because of the uncertain and fluctuating value of property of this nature. Experience and observation teach that an oil lease may be worth thousands of dollars today and tomorrow may be deemed as worthless, and that, on the other hand, a lease which may be of little value at a given time within a short period

may be transformed into one of fabulous value because of operations on adjacent and surrounding territory which develop oil wells and establish such lease as proven territory.

"Such being the facts, generally stated, we believe that as applied to a transaction of the nature involved in this suit, relating to a business in which the element of time is of higher importance than in any other business, it is fairly established that appellees' negligence and omission to act promptly upon discovering the asserted fraud rendered their conduct vulnerable to the plea of estoppel by laches. In our opinion the most indulgent consideration of the evidence discloses it to be insufficient to establish a right of rescission in the face of the facts sustaining this plea.

"Rescission, to be available, must be sought with promptness and diligence in any case; but what constitutes promptness depends upon all the facts and circumstances of each particular case. In trades involving property the value of which is fixed and free from fluctuation, the lapse of a comparatively long period of time after the discovery of the fraud may not afford any basis for the plea of estoppel by laches. In fact, the mere running of time is not of itself a determinative element of laches as it is of the legal defense of limitation. Laches is to be distinguished as consisting of negligence or omission to do, whenever it ought to be done, what the law requires to be done to protect a right which is presumed to have been abandoned because of such neglect or omission. Black on Rescission, § 541. But, while the law imposes the requirement of reasonable promptness in all cases to avoid laches, it requires greater diligence and activity in seeking to rescind transactions with reference to oil values affected by extraordinary uncertainty and fluctuation, as they are, than with reference to ordinary dealings. Twin Lick Oil Co. v. Marbury, 91 U.S. 592, 23 L. Ed. 328."

The strictness of the *Minchew* holding has not been relaxed in oil and gas lease cases. In *Murphy v. Johnson*, 54 S.W. 2d 158 (Tex. Civ. App.), it is held:

> "The rule by which laches and negligence delay in bringing a suit is measured is largely determined by the exigencies of the situation of the parties and the nature and character of the property furnishing the subject matter of the suit. It is a matter of common knowledge, which courts have universally recognized, that in dealing with oil and gas property it requires large expenditure of money to discover and reduce same to possession. Such property is also fugitive in its nature and subject to drainage under the laws of gravity, and also to great fluctuation in its value. Or as was said in the case of Twin-Lick Oil Co. v. Marbury, 91 U.S. 587, 592, 23 L. Ed. 328:
>
> > " 'The fluctuating character and value of this class of property is remarkably illustrated in the history of the production of mineral oil from wells. Property worth thousands today is worth nothing tomorrow; and that which would today sell for a thousand dollars as its fair value, may, by the natural changes of a week or the energy and courage of desperate enterprise, in the same time be made to yield that much every day. The injustice, therefore, is obvious, of permitting one holding the right to assert an ownership in such property to voluntarily await the event, and then decide, when the danger which is over has been at the risk of another, to come in and share the profit.
> >
> > " 'While a much longer time might be allowed to assert this right in regard to real estate whose value is fixed, on which no outlay is made for improvement, and but little change in value, the class of property here considered, subject to the most rapid, frequent, and violent fluctuations

> in value of any thing known as property, requires prompt action in all who hold an option, whether they will share its risks, or stand clear of them.'
>
> "And, in the language of the courts, the principle of laches is applied with greater force when the matter relates to oil and gas property and to minerals — the substance of which is fugacious, and the diligence required is measured by months rather than years, each case depending on its own particular facts and circumstances. Patterson v. Hewitt, 195 U.S. 309, 25 S. Ct. 35, 49 L. Ed. 214; Atlantic Life Ins. Co. v. Rowland (C.C.A.), 22 F. 2d 126; Dexter & Carpenter v. Houston (C.C.A.) 20 F. 2d 647; Galliher v. Cadwell, 145 U.S. 368, 12 S. Ct. 873, 36 L. Ed. 738; General Electric Co. v. Yost Electric Mfg. Co. (D.C.) 208 F. 719; Henry et al. v. United States (C.C.A.) 46 F. 2d 640; Minchew v. Morris (Tex. Civ. App.) 241 S.W. 215.
>
> "Appellants sat by and permitted the oil companies to expend large sums of money in developing and making the oil and gas property valuable; they therefore come clearly within the rule announced in the case of General Electric Co. v. Yost Electric Co., supra, to the effect that a comparatively short time may constitute laches when the conduct of the slothful is such as to induce others in good faith to expend money and take the risks of the enterprise."

Significant indeed is the Murphy reminder that a fortune can be spent on a lease while the negligent sleeps on his rights when we recall that:

> "* * * in the years following May 19, 1961, Mobil has expended millions of dollars in development and operations, including vast amounts of money in installing a recycling facility for the Coyanosa Wolfcamp Reservoir."

(Affidavit of Mobil Division Exploration Manager, K. F. Keller, Tr. 1166-1169.)

What justice lies in allowing the Belveals to stand by—possessed of knowledge that they say creates a right of cancellation of Mobil's lease—while Mobil expends millions to prove up that lease and develop it? The Belveals speculated on Mobil's money as they stood silent; if the lease went bad, no risk taken. Ah, but if the lease went well, then come the Belveals to claim all that Mobil had accomplished. The law will not permit such conduct. In *Holmes v. Cummings*, 71 F. 2d 364, in a Texas case very similar to our own, the Court of Appeals for the Fifth Circuit, through Judge Hutcheson, held:

> "Upon the plainest principles, it is obligatory on one having a right for fraud to rescind to promptly disaffirm upon discovery of it. If, with knowledge of the facts which give him the right to rescind, he does not promptly proceed to do so, though he may still sue at law for fraud, his right to rescind is lost. Especially is that so where, as here, the property involved is of a speculative nature, and with full knowledge of the facts plaintiff has waited, under changing conditions, to disaffirm. Restatement, Contracts, § 483. The delay here was unreasonable. *Though plaintiff knew* shortly after it came in of the Strake discovery well, and *in a general way* of subsequent developments in that vicinity, and though they were, as Holmes testified, dissatisfied with their trade, *they waited for many months to sue.*"

The delay from time of discovery of fraud until suit was filed in the *Holmes* case was from August 19, 1931 to October 8, 1932. This delay of *thirteen months and two*

weeks barred the plaintiff's right of action. In our case the Belveals delayed at least from November, 1965 until August 23, 1966 to bring suit: over one year before alleging fraud and conspiracy; and a delay almost exactly equivalent to that under discussion in the *Holmes* case.

The Court of Civil Appeals, by unanimous opinion, concluded that this record establishes Mobil's right to judgment on the Belveal claims of fraud in the 1961 lease agreement. There is no evidence of fraud, there is conclusive proof of unreasonable delay. By reason of such laches, the Belveals should be and they are now estopped to assert any such cause of action.

b. *Athey's Authority to Give Mobil a Lease*

(1) *Athey's Specific Authority.*

Athey delivered to Mobil, for $72,000.00 paid to the Lessors, the extension agreement; Athey's execution and delivery occurred under a written and recorded Power of Attorney, signed and acknowledged by each of the Belveals who are now parties to this suit. (See Fourth Petition, par. 2p, Tr. 591-594.)

The Power of Attorney was *executed in August, 1960,* over nine months *before* the extension agreement, over seventeen months *before* Athey, Hodgden and Brim entered into their arrangements, and over nineteen months *before* deeds passed from the Belveals to Athey.

This Power, by its express terms, binds the Belveals to an appointment of Athey as

> "* * * our true and lawful attorney for us and in our names, place and stead * * * to make, acknowledge, execute and deliver oil, gas and/or other mineral leases * * * for such consideration and upon such terms and conditions as he alone shall determine * * *"

The validity of this Power of Attorney is not questioned by the Belveals. *To the contrary, the Power is expressly pleaded and expressly relied upon by the Belveals in this suit.* It forms the basis for the Belveals' claim of a fiduciary relationship on the part of Athey. (Fourth Petition, par. 2p, 2q, Tr. 591-596.)

As the holder of the express Power, Athey had the right to give—and Mobil had the right to take—a binding oil and gas lease on lands covered by the Power. *Baxter v. Yarborough*, 46 Tex. 231; *Link v. Page*, 72 Tex. 592, 10 S.W. 699; *Pool v. Unknown Heirs of Foster*, 49 S.W. 923 (Tex. Civ. App.).

The so-called "Lease Extension" agreement is in law and in fact a binding oil and gas lease. In it are all essential elements: it is in writing, it is signed by one with authority to sign, it was delivered. It contains specific words of grant:

> "* * * the undersigned do hereby lease, let and grant unto the lessee * * * its successors and assigns, the above described land under all of the terms and provisions of said lease * * *"

It sufficiently identifies the property leased; it leaves no uncertainty as to the rights and obligations, respectively of lessor and lessee, for by specific reference to a recorded instrument it incorporates drilling, rental and surrender clauses, and a habendum clause. It is supported by adequate consideration. *The agreement of May 19, 1961, is an oil and gas lease.* See Walker, *The Nature of the Property Interests Created by an Oil and Gas Lease in Texas*, 7 *Texas Law Review*, 111 et seq. 555-562; *Stephens County v. Mid-Kansas Oil & Gas Co.*, 254 S.W. 290 (Tex. S. Ct., 1923); *Hager v. Stakes*, 294 S.W. 835 (Tex. S. Ct., 1927); see also Vol. II, *Summers on Oil and Gas*, ch. 9, 10 and 11, pp. 2-482, for a full discussion of "Validity of Oil and Gas Leases."

No one—not even the Belveals—contends that Athey did not hold a valid Power of Attorney in May, 1961, granting him the express power to execute and deliver an oil and gas lease covering the Belveal property. The Belveals refuse to admit that Athey *exercised* that power in the giving of the extension agreement, earning for the Belveals their part of a bonus consideration of some $72,000.00 and subsequent delay rental payments. Certainly the Power given Athey was broad enough to include the execution of the "Extension of Lease" agreement.

Confident though we be that Athey had the power to execute the 1961 extension agreement and that the in-

strument was itself a "lease" within the powers granted Athey, there are yet other compelling reasons why the Court of Civil Appeals held the Belveals to be barred from successfully claiming a want of authority in their Attorney-in-Fact. These bars are estoppel, ratification, and the statutes of limitation.

(2) *Estoppel and Ratification.*

When the 1961 instrument was delivered to Mobil, Mobil paid $72,423.51 in consideration for it. (Tr. 1159-1160.) The Belveals admit in their pleadings that they received and accepted this money, and that it was retained and used by them until a tender of return was set forth in their *Third Petition* filed December 26, 1966, as follows:

> "* * * plaintiffs *here and now* tender all of the money and consideration *heretofore* received by the plaintiffs back to * * * Mobil * * *"

(Third Petition, par. 27, Tr. 615.)

Of equal significance, *Mobil paid delay rentals under the extended lease*—for the period from March 19, 1962, to March 19, 1963—*to the depository bank selected by the Belveals, for the respective account of each plaintiff in this suit.* The delay rentals were deposited in the bank in February, 1962. These delay rentals were not payable under the original ten year term of the 1952 lease, but were payable only under the lease agreement of May, 1961. (Tr. 1164-1165.)

The Belveals, by judicial admission, acknowledge that they received and accepted these delay rentals, and that they retained and used these funds, pleading as follows:

> "* * * plaintiffs here tender and are willing for the defendants and each of them to recover any monies or benefits *accepted under the terms of said lease* by plaintiffs * * *"

(Third Petition, par. 27, Tr. 615, filed December 29, 1966.)

We ask the Court to bear in mind that the Belveals admit they gained full knowledge of all circumstances surrounding the 1961 lease agreement in November, 1965 (Fourth Petition, par. 30a, Tr. 624), but that the Belveals retained all benefits accepted by them under the agreement for over one year after gaining such knowledge before tendering the return of such funds.

These facts clearly impel a holding that the Belveals are now estopped from asserting any defect in the very instrument under which they, or their predecessors in title, accepted benefits.

In *Bearden v. Texas Co.*, 41 S.W. 2d 477, aff'd. 60 S.W. 2d 1031 (Tex. Comm. App.), it is held:

> "* * * the defense of estoppel as against Bessie Lee Griffin was conclusively established by her act in recovering from her former guardian on final settlement * * * several thousand dollars collected by him as royalties from the lease which was assailed by her; and further receipts of royalties * * * amounting to more than $1,000, since such acts conclusively bound her to a ratification of the lease * * *"

In *Texas Co. v. McMillan*, 13 F. Supp. 407, Judge Atwell held, in applying Texas law:

> "The McMillians * * * received payment from the Complainant (The Texas Co.) upon such portion of the lands as were developed. Such acquisition and acceptance of benefits by them from the complainant places them in the attitude of having recognized, confirmed, and ratified the title of complainant, and they are estopped to deny its estate * * * A person certainly cannot be permitted to claim both under and against the same deed."

In *Leopard v. Stanolind Oil Co.*, 220 S.W. 2d 259 (Tex. Civ. App. 1949, er. ref., n.r.e.), estoppel was held to exist as a matter of law where one questioning a lease was shown to have accepted and cashed royalty checks. In *Buchanan v. Sinclair Oil & Gas Co.*, 218 F. 2d 436 (5th Cir., Tex. 1955), it was held that acceptance and retention of delay rentals estopped the lessor from denying the validity of an oil and gas lease. In *Mitchell v. Simms*, 63 S.W. 2d 371 (Tex. Comm. App. 1933), a lessor was estopped from claiming that the lease was not in force when he had accepted delay rentals. In *Myers v. Crenshaw*, 116 S.W. 2d 1125 (Tex. Civ. App., 1938), *McCoy v. Texon Royalty Co.*, 124 S.W. 2d 877 (Tex. Civ. App., 1939, err. dis., judg. conf.), *Humble Oil & Refining Co. v. Harrison*, 205 S.W. 2d 355 (Tex. S. Ct. 1949), *Gulf Production Co. v. Continental Oil Co.*, 164 S.W. 2d 488 (Tex. S. Ct. 1942), and in *Ball v. Yowell*, 222 S.W. 2d 277 (Tex. Civ. App. 1949, er. ref., n.r.e.), it was uniformly and consistently held that *acceptance of benefits (delay rentals) under a lease absolutely precludes an attack on the lease.*

The acceptance by the Belveals of benefits under the May, 1961 lease agreement was not accidental, nor can the Belveals claim they did not know what the money was for. Marion J. Belveal, the agent for the family in handling the Pecos County property here involved, has admitted in his deposition:

"Q. * * * you had received some money, had you not, you and your brothers and sisters, from a renewal of an oil and gas lease?

"A. Oh, yes, we had received renewal payments and bonus payments * * *

"Q. Had (they) not executed an extension of lease agreement with Socony Mobil for which you and your brothers and sisters had received in the aggregate, it seems to me, it was a rather large sum of money?

"A. Well we received a rather large sum of money on a renewal, but I don't recall the dates on it." (Belveal deposition, Vol. I, p. 38-39.)

"Q. But now in May of 1961 or June of 1961, you and some of the family did receive compensation for an extension of this lease held by Mobil, did you not?

"A. The date, the month, the time, I can't say, but we have received an extension from some oil company. I believe the sheet that Chuck sent me would show who it was leased to.

"Q. Don't you remember it being Mobil?

"A. Not that specific instance, no sir.

"Q. Well, what other instance, you say not that specific instance?

"A. Well, I mean that he sent us information that he was leasing and re-leasing or extending whatever

it might have been with Mobil Oil Company and I believe Tidewater Oil Company was another one, and if there was another one, I don't recall it.

"Q. In any event, at the time that you were trading in these properties, you knew that Mobil had a lease on some or part of them, or some interest in some of them?

"A. Sometime during the entire interval between the time that we discovered that we did have these properties and the time we sold, yes sir, I knew that Mobil had a lease on it.

"Q. And at that time and in May or June 1961, when the extension of the lease was made, you took the money that come to you for signing that extension, didn't you?

"A. Took the money that was sent to me, yes sir.

"Q. And you spent it?

"A. Since I do not have a large amount of money on hand, I would say that I spent it — yes sir.

"Q. You used it for what you wanted?

"A. Yes sir." (Belveal deposition, Vol. II, pp. 17-19.)

"Q. And what amount of money did you receive for any extension that you now remember?

"A. Well, it was for an extension or a renewal or a bonus lease, I don't have the least idea.

"Q. I said, what sum of money was it that you received?

"A. I couldn't quote the sum.

"Q. Do you recall having received from Mr. Athey a sum of money that represented the Belveal part

of a seventy-odd thousand dollar amount that had been paid by Mobil for an extension of a lease?

"A. Well now, that $70,000.00 doesn't ring a bell at all.

"Q. Well, now, that is for all, not for Belveals' part.

"A. No, what would be the Belveals part in that?

"Q. Ten Thousand some odd approximately.

"A. I don't recall ever receiving a check for $10,000.00.

"Q. Well, how about $9,000.00?

"A. Yes, $9,000.00 and something rings a bell.

"Q. Well, do you now, that figure nine thousand having been, having rung a bell, do you remember the purpose for which you believed that sum had been received?

"A. That particular sum, I believe, was for a renewal or for a bonus lease. The beginning, now how long it extended for, I don't know.

"Q. For a new lease?

"A. Yes.

"Q. Well, you did receive some information about what that nine thousand odd dollars was for, did you not?

"A. I believe it was on the check.

"Q. In April 7th, in 1962, you knew that you received nine thousand odd dollars for the Belveal interests in an oil and gas lease. You knew, at that time?

"A. Yes, sir." (Belveal deposition, Vol. I, pp. 106-109.)

Marion Belveal, the administrator of the Belveal family property in Pecos County, was not alone in his understanding and acceptance of benefits under the May, 1961 lease agreement. Mrs. Golda Branom, one of the parties to this suit, and older sister of Marion Belveal, has testified:

> "Q. In 1962 now, when you signed — or I will say in 1960, when you signed this on August 22, 1960, this instrument, did you know at that time that Mr. George Athey, in his lifetime, had in 1952 had executed an oil and gas lease in favor of a lessee covering the land in Pecos County, Texas, that are involved in the suit that you have filed No. 3583 in the 83rd District Court of Pecos County, Texas?
>
> "A. Well I must have.
>
> "Q. And as a matter of fact, you had received, had you not, over the years your proportion and part of delay rental that would be due under that lease?
>
> "A. I am sure we did now.
>
> "Q. And as a matter of fact you had been reared, had you not, in an oil field community and you knew about oil and gas leases and delay rentals and those kind of provisions that appear it —
>
> "A. Oh, sort of.
>
> "Q. And you had been the beneficiary of those under this lease and others that your father and then you had executed?
>
> "A. Yes.
>
> "Q. And then we both know the term of delay rental was not a strange word to you, you knew what that was?
>
> "A. Yes sir.

"Q. And you knew about a bonus for oil and gas leases?

"A. Yes.

"Q. And as a matter of fact you had a general speaking knowledge of oil and gas leases and oil and gas terms all of your life now, have you not, all of your adult life?

"A. Yes sir, sort of.

"Q. And then do you — but you do know that you had received your part and proportion of delay rentals that had been paid under this lease that Mr. George Athey executed during his lifetime?

"A. Yes sir.

"Q. Well, did you receive your proportion and part, did you not, for the bonus or consideration that was paid for the execution of that two year instrument?

"A. I'm sure I was, because we were paid —

"Q. The Belveal interest in these sections was an undivided 1/7th part, was it not, you knew that, did you not?

"A. Yes.

"Q. And the other 1/7ths part were owned you knew, did you not, by others of the families in Enid?

"A. Yes.

"Q. And they had been bought, those particular sections, had been bought by your father, Mr. Charles B. Athey's grandfather, and other of the Enid residents some time before the '30's, under your understanding?

"A. Yes sir.

"Q. And you knew it was a family owned thing?

"A. Yes sir.

"Q. Now I believe it has been suggested in this record that at the time that this two year lease was executed in Socony's favor, Socony Mobil's favor that there was a Seventy some odd Thousand Dollar ($70,000.00) consideration paid for it, not for the Belveals alone but that the Belveal part was a part between Nine (9) and Ten (10) Thousand Dollars. Do you remember a distribution being made to you by your brothers of your proportion and part of a Nine (9) or Ten (10) Thousand Dollars, that was paid for that lease?

"A. I'm sure of it." (Belveal deposition, Vol. II, pp. 70-74.)

"Q. And you were then in about 1961, the Belveals received some Nine or Ten Thousand Dollars ($9,000.00 or $10,000.00) for extension of this lease, covering the Pecos County, Texas properties, did you not?

"A. Yes sir.

"Q. And you took your share of the money?

"A. Yes sir.

"Q. And you spent it the way you wanted to?

"A. I did.

"Q. No complaint with the lease owner or operator, Mobil, that I represent?

"A. Not that I know of.

"Q. And you didn't complain to Mobil, you just took their money and spent it and gave them the extension of the lease, didn't you?

"A. That's right." (Belveal deposition, Vol. II, pp. 128-129.)

The estoppel which operates in this case simply denies to the Belveals their claim that Athey was without authority to extend Mobil's leasehold estate. The Belveals accepted benefits under the agreement to extend, with knowledge of what they were doing, and have retained those benefits from May, 1961 right up until this good day. *They have never repaid what they took under the agreement and spent for their own purposes.*

Of particular application here are cases such as *Doty v. Barnard*, 47 S.W. 712, where the Supreme Court declared:

> "'The doctrine of election is founded upon the principle that there is an implied condition that he who accepts a benefit under an instrument must adopt the whole of it, conforming with all of its provisions and renouncing every right inconsistent with them. The principle is recognized and established in this country almost precisely the same as in England, and rests upon the equitable ground that no man can be permitted to claim inconsistent rights with regard to the same subject, and that any one who claims an interest under an instrument is bound to give full effect to that instrument as far as he can. *A person cannot accept and reject the same instrument, or having availed himself of it as to part, defeat its provisions in any other part; and this applies to deeds, wills, and all other instruments whatsoever.*"

In addition to receiving and accepting and retaining the bonus payments for the 1961 agreement, the Belveals received, accepted and retained delay rentals payable to them only because of the 1961 agreement. They are estopped to deny the continuing effect of such agreement in whole and in all of its parts.

This is the holding of the Supreme Court in *Loeffler v. King*, 236 S.W. 2d 772, and the many cases thereafter following and citing it. See, e.g., *Lowe v. Ragland*, 297 S.W. 2d 668 (S. Ct.); *Texas & Pacific Coal & Oil Co. v. Kirtley*, 288 S.W. 619 (Tex. Civ. App., err. ref'd.).

Cases such as *Doty v. Barnard* and *Loeffler v. King* establish the universal rule that one may not accept benefits under an instrument and then later attempt to repudiate any part of it. *This rule is also applied to cases such as our own where a principal (the Belveals) accepts money under an instrument of title (the 1966 lease extension) executed by an agent (Athey) in his representative capacity (the 1960 Power of Attorney) and then later seeks to deny the estate granted by the agent (Mobil's lease).*

In 1910 the Supreme Court of Texas foreclosed just such denials of agency as the Belveals now seek to assert. In *Horst v. Lightfoot*, 132 S.W. 761 (1910), L. G. Clepper had a Power of Attorney from George Resley, under which Clepper could sell Resley's lands *for cash, if over $1.00 per acre was obtained.* Under the Power of Attorney and as agent, Clepper conveyed some of Resley's land to Mitchell. This sale was for less than $1.00 per acre, and the sale was made for part cash, part credit.

It is clear, of course, that the Clepper conveyance was without authority and did not pass title. However, the

Supreme Court upheld the validity of the deed, specifically holding that it did pass title. The reason? The court said:

> "All that was necessary to a ratification was that the proceeds of the sale should have been paid to Resley by Clepper and retained by the former." (132 S.W. at 763.)

From this case we know that even if an agent exceeds his powers under a written Power of Attorney in executing a conveyance (the precise Belveal claim here), the principal may not deny the estate granted if he has accepted and retained the consideration given for the conveyance.

Horst v. Lightfood, supra, is but the first in an unbroken line of authority. In *Oberholtzer v. Myles*, 147 S.W. 2d 569 (Tex. Civ. App. 1941, err. dis'd., judg. corr.), Pitman was agent for Conder in arranging a sale of a royalty interest. Conder left a signed deed with Pitman with instructions to hold the deed until Conder gave authorization to deliver it. Pitman undertook to make a sale of Conder's property to Oberholtzer, *through fraud and conspiracy* Conder alleged, and Pitman delivered the deed to Oberholtzer. Oberholtzer's payment for the royalty interest was sent to Conder on April 26, 1937. Conder "retained the consideration and used and appropriated it." Conder filed suit on May 14, 1938 *(thirteen months* after Conder had full knowledge of the transaction, as compared with the Belveals' delay of at least *ten months* in our case). The Amarillo court held:

> "This conveyance was not void and appellees could estop themselves by ratification. W. H. Threadgill et al. v. Butler, 60 Tex. 599; Fennimore v. Ingham

et al., Tex. Civ. App., 181 S.W. 513; Gray v. Fenimore, Tex. Com. App., 215 S.W. 956; Burke-Mobray et al. v. Ellis et al., 44 Tex. Civ. App. 21, 97 S.W. 321; Schleicher et al. v. Runge et al., Tex. Civ. App., 37 S.W. 982; Dallas Joint Stock Land Bank of Dallas v. Burck et al., Tex. Civ. App., 102 S.W. 2d 1074.

"A grantor may on the general principles of ratification by his words, acts and conduct estop himself from denying the delivery of, or from attacking the validity of a deed. 14 Tex. Jur. 827, para. 64.

In 2 Tex. Jur. 487, para. 89, the author says: '*The principle is well established that, if one without authority assumes to act as agent, or if an agent exceeds his proper authority, the principal knowingly receiving and retaining the benefit of the transaction will be held liable. This principle is founded on estoppel.*'

"In American Jurisprudence, Vol. 2, page 181, para. 227, the law is stated thus: 'It is an established principle of law that where a person acts for another who accepts or retains the benefits or proceeds of his efforts with knowledge of the material facts surrounding the transaction, the latter must be deemed to have ratified the methods employed, as he may not, even though innocent, receive or retain the benefits and at the same time disclaim responsibility for the measures by which they were acquired.'

"In Horst et al. v. Lightfoot et al., 193 Tex. 643, 132 S.W. 761, 763, Justice Williams, speaking for the Supreme Court relative to the ratification by the principal of the unauthorized act of an agent in connection with the consideration accepted for land, says: 'All that was necessary to a ratification was that the proceeds of the sale should have been paid to Resley by Clepper according to his duty and retained by the former. If he received only the money paid in cash and kept it, he must have known that

the sale was made partly on credit and have elected to abide by it; and the same conclusion would result, for a stronger reason, from the receipt and retention of both the cash and the credit payments or of any obligation taken or the latter.'

"See also Harrison et al. v. McMurray et al., 71 Tex. 122, 8 S.W. 612; Vogel et ux v. Zipp et al., Tex. Civ. App., 90 S.W. 2d 668; W. R. Miller & Co. v. Hobdy et al., Tex. Civ. App., 159 S.W. 96; Burke-Mobray et al. v. Ellis et al., supra.

"The judgment is reversed and here rendered that appellant, R. V. Oberholtzer, recover of and from the appellees title and possession to an undivided one-half interest in and to the oil, gas and minerals on Section 36-B in Block AX, Public School Land, containing 388 acres, situated in Yoakum County, Texas."

No case better illustrates the uniformity of the Texas cases on this point than *Condor Petroleum Co. v. Greene*, 164 S.W. 2d 713 (Tex. Civ. App., 1942, err, ref'd., w.o.m.). The court held:

"Under all the authorities a principal who, with knowledge of the material facts, retains the benefits of a contract made in his behalf by an unauthorized agent cannot repudiate that part of the contract which is unsatisfactory to him. Having knowledge of the facts and retaining the benefits, he is considered as having ratified the contract in its entirety, and is so bound. 2 C.J.S., Agency, § 49, p. 1097, and 1104; 5 Am. Jur. 320; Braxton v. Haney, Tex. Civ. App., 82 S.W. 2d 984 writ refused; State Life Ins. Co. v. Duke, Tex. Civ. App., 69 S.W. 2d 791, writ refused; Williams v. Nolan, 58 Tex. 708, 712; Nason v. Addison County Trust Co., 104 Vt. 183, 157 A. 821; Oklahoma Title Co. v. Burrus, 172 Okl. 94, 44 P. 2d 852; Republic of China v. Merchants' Fire Assur. Corp., 9 Cir., 49 F. 2d 862, 865; Ferinac v. Italian Importing Co.,

Iowa, 179 N.W. 823, 824; McGinley v. Marylans Cas. Co., 85 Mont. 1, 277 P. 414, 417, 72 A.L.R. 1; National Surety Co. v. Jackson County Bank, 4 Cir., 20 F. 2d 644, 646; Waggoner v. Western Carolina Pub. Co., 190 N.C. 829, 130 S.E. 609; Kelley v. Isensee, 60 N.D. 149, 233 N.W. 245; Wm. Cameron & Co. v. Gibson, Tex. Civ. App., 278 S.W. 522, writ refused; Roller v. Wooldridge, 46 Tex. 485, 495; Ellis v. Simmons, 5 Cir., 11 F. 2d 596; Armour Fertilizer Works v. Maddox, 168 Ga. 429, 148 S.E. 152; Wilkins v. Waldo Lumber Co., 130 Me. 5, 153 A. 191; Miller v. Chatsworth Sav. Bank, 203 Iowa 411, 212 N.W. 722; Maryland Cas. Co. v. Beebe, 10 Cir., 54 F. 2d 743; Horst v. Lightfoot, 103 Tex. 643, 648, 132 S.W. 761; Scott v. Lott, Tex. Civ. App., 247 S.W. 685; New Amsterdam Cas. Co. v. Harrington, Tex. Civ. App., 11 S.W. 2d 533, 539; Murchison v. Davis, Tex. Civ. App., 4 S.W. 2d 1016, 1018; Lynch Davidson & Co. v. Denman Lumber Co., Tex. Civ. App., 272 S.W. 803; Jason Weiler & Sons v. Haskell Nat. Bank, Tex. Civ. App., 13 S.W. 2d 384; Grayburg Oil Co. v. Powell, 118 Tex. 354, 26 S.W. 2d 333; Owen v. King, Tex. Civ. App., 84 S.W. 2d 743, reversed on other grounds 130 Tex. 614, 111 S.W. 2d 695, 114 A.L.R. 859; Texas P.C. & O. Co. v. Smith, Tex. Civ. App.,) 30 S.W. 2d 425. Also see State Life Ins. Co. v. Duke, Tex. Civ. App., 69 S.W. 2d 791, writ refused; Dunlap v. Villareal, Tex. Civ. App., 91 S.W. 2d 1124; Kreis v. Kreis, Tex. Civ. App., 54 S.W. 2d 1107; 2 Tex. Jur. 487."

Every element of estoppel is present in this case to prevent the Belveals from asserting that Athey was not empowered to execute and deliver the May 19, 1961 extension agreement. Every element of estoppel is established as a matter of law. The Belveals have judicially admitted — by pleading and deposition — the acceptance by them of monetary benefits under the agreement they

now attack. The Belveals admit they took and used this money, that the funds were retained. Having thus ratified the agreement, the Belveals are, as correctly held by the Court of Civil Appeals, estopped to deny Mobil's leasehold granted in the agreement.

(3) *The Statute of Limitations*

As already specifically set forth, this action for cancellation of the instrument creating an oil and gas leasehold estate (the May, 1961 extension agreement) was not filed until August 23, 1966 — five years after the delivery — for value — of the agreement.

As already set forth, the Belveals received and accepted payments under the agreement in 1961 and in 1962 — and they have admitted in deposition testimony that when the money was received *they knew of the extension agreement.*

We have explained that the Belveal plea for cancellation of the 1961 agreement is two-fold:

1. The instrument was secured through fraud and conspiracy; *or*

2. Athey was without authority to extend the Mobil lease.

Earlier in this brief we have taken a detailed look at the claim of fraud and shown where there is no evidence to support it. In conjunction with our answer to the claim of fraud we showed that even if fraud and conspiracy is presumed (which the trial court must have done), then even so the Belveals have no standing to assert a cancel-

lation because of the doctrine of *laches*. It was there we pointed out cases such as *Minchew v. Morris*,[4] where a delay of *two months* was held to bar a suit for cancellation.

Turning now to the Belveal claim for cancellation because of lack of authority in Athey, we assert that this claim is barred by the statute of limitation.

In discussing this area of the case we must make crystal clear that the Belveal claim, relative to claimed lack of authority of Athey, is a claim that the 1960 Power of Attorney signed by the Belveals was not broad enough to include a power of extension. (See Fourth Petition, par. 27, Tr. 614-615.) Without getting involved in any quarrel about this claim, as such, let us draw the Court's attention to the fact that *whatever powers were given to Athey in the 1960 Power of Attorney, the Belveals knew what those powers were.* They cannot deny knowledge of the instrument they signed and acknowledged, and upon which they specifically rely in this suit.

We ask the Court to add to the fact that the Belveals had knowledge of the Power the fact that in 1961 the Belveals knew of a lease extension agreement on their Pecos County property (Belveal deposition, Vol. I, pp. 38-39, 108-109; Vol. II, pp. 17-19, 70-74, 128-129).

If the Belveals are now correct in saying that Athey exceeded his Power of Attorney in giving the 1961 lease extension, then we say that suit should have been filed to

[4] *Minchew v. Morris*, 241 S.W. 215.

cancel the extension agreement within four years after May 19, 1961.

Suits for cancellation of instruments are subject to the statutes of limitation. *Cooper v. Lee*, 12 S.W. 483 (Tex. S. Ct.); *Deaton v. Rush*, 252 S.W. 1025 (Tex. S. Ct.); *Gareis v. Gordon*, 243 S.W. 2d 259 (Tex Civ. App.); *Finney v. Finney*, 164 S.W. 2d 263 (Tex. Civ. App., err. ref'd., w.o.m.)

A suit for cancellation of an instrument of title is subject to *Art. 5529, Tex. Rev. Civ. Stat.*, providing a limitation period of four years following accural of the cause of action. *Fitchett v. Bustamente*, 329 S.W. 2d 920 (Tex. Civ. App., err. ref'd., n.r.e.); *McMullen Oil & Royalty Co. v. Lyssy*, 353 S.W. 2d 311 (Tex. Civ. App.); *McMullen Oil & Royalty Co. v. Korzekwa*, 344 S.W. 2d 525 (Tex. Civ. App., err. ref'd., n.r.e.); *Cartwright v. Minton*, 318 S.W. 2d 449 (Tex. Civ. App., err. ref'd., n.r.e.); *Deaton v. Rush*, 252 S.W. 1025 (Tex S. Ct.).

If Athey executed a conveyance not authorized by the Belveals, a cause of action for cancellation accrued when the Belveals learned of the conveyance. *This was in 1961.* The filing of suit on August 23, 1966 is barred by *Art. 5529.*

3. *Conclusion — Mobil's Leasehold Estate*

Every equity demanded the restoration to Mobil of its oil and gas lease by the Court of Civil Appeals. Mobil bought that estate in good faith and paid value for it. Mobil dealt with the agent appointed by the Belveals and

relied upon his authority under the Power of Attorney placed on record by the Belveals.

No fraud was practiced by anyone — not by Mobil, not by Brim, not by Athey — in the giving of the May 19, 1961 agreement under which Mobil holds. There is not one word of competent deposition testimony, not one exhibit, not one affidavit, that raises a fact question of fraud or conspiracy in 1961.

If there were defects in the 1961 agreement they have been waived; by acceptance of monetary benefits under the agreement the Belveals ratified and confirmed what Athey had done in their name; and the Belveals are now estopped to deny Mobil's estate.

The Belveals did not question the Mobil lease at any time from its inception in 1952 — not at the time of the original lease, nor at the time of the lease extension in 1961, nor when money came to the Belveals under the agreement in 1962, nor when fraud was first suspected in November, 1965, nor even, indeed, when the Belveals filed suit in February, 1966. Not until August 23, 1966, did the Belveals belatedly decide that they wanted cancellation of Mobil's lease.

This after-thought lawsuit has no merit. Mobil's Motion For Summary Judgment validating and confirming its lease should have been granted by the trial court, and was correctly granted by the Court of Civil Appeals.

B. The State Court Correctly Over-turned Petitioners' Summary Judgment to the Deeded Lands.

1. The Record Facts.

The facts quoted from the record in Part I A. of this brief are relevant here;[5] to avoid burdening the court we do not undertake to repeat those facts. To those already stated should be added:

(a) Following execution of and payment for the Lease agreement of May, 1961, Brim (a Mobil employee), Athey and Hodgden (a lease broker from Enid, Oklahoma), agreed to acquire jointly, if they could, the undivided 1/7 interest believed by them to be owned by the Belveals in Sections 44, 52 and 56, Block OW, T.T. Ry. Co. Survey, Section 18, Block 143, T. & St. L. Ry. Co. Survey, and part of Section 15, Block 48, T-8, T & P Ry. Co. Survey in Pecos County, Texas. (Brim Deposition, pp. 38-41).

(b) The Brim-Athey-Hodgden agreements were reduced to writing in March, 1962 and April, 1962. (Tr. 645-646).

(c) On or about March 29, 1962, Marion J. Belveal and the other plaintiffs executed and delivered to Charles B. Athey their general warranty deeds, bearing date of March 29, 1962 and April 4, 1962, recorded in Volume 253, pages 554, 558, 560, 562, 564 and 566, respectively, Deed Records of Pecos County, Texas. These are the deeds pleaded and described in plaintiffs' Fourth Amended

[5] Pages 9 through 14.

Original Petition and copies thereof attached thereto as Exhibits "E", "F", "G", "H", "I", "J" and "K". (Tr. 648, et seq.)

(d) The Belveals were paid $105,000.00 for these deeds. The purchase was made by Athey for the joint account of Athey, Brim and Hodgden. (Brim Testimony, Ex. AF to Fourth Petition, Tr. 938-940.)

(e) The Belveals *claim* they did *not* know that Athey was the purchaser under the seven 1962 deeds; that they were not fully advised of the information Athey had when he so purchased; that they would *not* have conveyed had they known all material facts. (Depos., Marion J. Belveal, Golda Belveal.) (This is a contradicted "fact." As discussed in the Athey and Hodgden briefs, there is competent evidence showing that the Belveal-Athey transaction was entirely proper. But this dispute of fact is not important to this part of our argument.)

(f) On October 22, 1962, Charles B. Athey executed and delivered to Socony Mobil Oil Company, Inc. a general warranty deed, recorded in Vol. 258, Page 556, Deed Records of Pecos County, Texas, covering a 1/14 interest in the oil, gas and other minerals in and under and that may be produced from the above mentioned and referred to Sections 44, 52 and 56, Block OW, and Section 15, Block 48, and an undivided 1/14 interest in and to the surface estate of Section 18, Block 143, T & St. L. RR. Co. Survey, all in Pecos County, Texas. A copy of this deed is attached as Exhibit "RR" to plaintiffs' amended petition.

(g) During 1964, Mobil learned that Brim had acquired, in violation of his duties to Mobil, certain mineral interests in Pecos County (Tr. 1106). Mobil then filed suit in U. S. District Court to impose a constructive trust on all property, and proceeds, illegally acquired by Brim (Ex. AE, Fourth Petition, Tr. 878).

(h) Following a partial hearing in Federal Court (Ex. AF, Fourth Petition, Tr. 891), Brim deeded to Mobil certain of the properties claimed by Mobil in the suit, and an agreed judgment of dismissal was entered in Federal Court (Tr. 1147). The Brim deeds to Mobil covered an undivided 1/168 in Sections 44, 52 and 56, Block OW, (Tr. 866), another undivided 1/168 in Sections 44, 52 and 56, Block OW (Tr. 868), and an undivided 1/42 in part of Section 15, Block 48 (Tr. 870). In consideration for these deeds, Mobil relinquished its claim to $28,000.00 received by Brim for a conveyance of part of the property to Childress Royalty Company (Tr. 1106).

(i) At the time suit was filed, and at the time the Brim deeds were obtained, *Mobil did not know of any claimed fraud* as between Brim, Athey and Hodgden, on the one hand, and the Belveals (Mobil's sworn Motion; Affidavits of Akin, Moriarity; Tr. 1082, et seq.)

The Belveals position is that the facts compelled a summary judgment against Mobil, cancelling the Athey to Mobil deed, because:

> 1. Athey, Brim and Hodgden defrauded the Belveals in March, 1962, when the Belveal to Athey deeds were obtained;

2. Brim was a Mobil vice-principal, hence Mobil is bound by his fraud; and

3. Mobil took its deeds and took title to its undivided interests charged with all knowledge possessed by Brim, so that a constructive trust should follow the land through Athey into Mobil.

In this portion of the brief we will examine the Belveal contentions 2 and 3 set forth above. We pretermit a discussion under claim number 1, which is squarely met in the brief of the respondents Hodgden and Athey.

Quite obviously if there was no initial fraud in March, 1962 — and if the trial court conclusion to the contrary is erroneous — no judgment can stand against *any* of the respondents. The Court of Civil Appeals has so held. We join in and endorse the Athey-Hodgden position with respect to original fraud.

Insofar as Mobil is concerned, however, two points should be made:

(1) *Even if the Athey-Belveal transactions involved fraud, no recovery can be had against Mobil.*

(2) *Even if a constructive trust is established against Athey, the trust would not reach Mobil's title.*

These conclusions we base on (1) the law as it applies to the Brim-Mobil relationship, and (2) Mobil's status as a bona fide purchaser for value.

2. Analysis Of The Facts And Law

a. *The Mobil-Brim Relationship*

A trusted Mobil employee for over eleven years, a licensed attorney, holder of the job of Division Staff Landman with Mobil, Brim was deeply involved in the workings of Mobil until February 1, 1963, when he resigned.* During his tenure with Mobil as Division Staff Landman, Brim was entrusted with confidental information concerning Mobil's activities and future plans for the conduct of its business — exploration, development, and production of oil, gas and other minerals.

In his employment by Mobil, Brim became aware that Mobil was desirous of acquiring leases and minerals in Pecos County, particularly in the Coyanosa area, because of Mobil's educated guess that this area might well be made productive of oil and gas.

Brim could not do the work for which he was employed without information such as this. But Mobil, realizing the need for safeguards against the frailties of human nature, asked of Mr. Brim these loyalties:

> *First*, that he not communicate company information to outsiders, and
>
> *Second*, that he not acquire for himself any mineral interests, nor aid others in such acquisition.

---

*All of the facts stated here are established without contradiction or dispute. Each fact stated in his portion of the brief has been specifically pleaded by the Belveals (Fourth Petition, Tr. 580, et seq., with exhibits) or appears in Brim's deposition. We do not believe the Belveals will quarrel with this factual summary, and accordingly we do not burden the court by record references.

Mr. Brim not only understood these requirements, he expressly bound himself, in writing, to their observance.

The record before this Court contains no evidence of any wrongdoing by Brim until early 1962. This record is silent — save for the extravagant but unsupported claims of Belveals' pleadings — on any dereliction by Brim until his dealings with Athey and Hodgden in the spring of 1962 when the three reached agreement:

> (1) To purchase for their joint account stock in General Royalties Corporation, an Oklahoma company owning mineral interests in Pecos County, Texas, on which Mobil had an existing oil and gas lease (March 23, 1962); and
>
> (2) To purchase for their joint account, but in the name of Athey, from the Belveals
>
> (a) An undivided 1/7 interest in the oil, gas and other minerals in and under Sections 44, 52 and 56, Block OW, TT Ry. Co. Survey,
>
> (b) An undivided 1/7 interest in the oil, gas and other minerals in and under Section 15, except the West 200 acres of the North 1/2 thereof, in Block 48, T & P Ry. Co. Survey, and
>
> (c) An undivided 1/7 interest in the surface of Section 18, Block 143, T & St. L. Ry. Co. Survey, all of which lay in Pecos County.

These interests, except for the interest in Section 18, were subject to an existing lease owned by Mobil Oil Company (April 10, 1962).

During the period in which these transactions were made, and, in fact, to acquire such interests, J. K. Brim is said to have divulged confidential information, gained

through his employment, to both Athey and Hodgden. As a result of these agreements, Athey secured from the Belveals the seven deeds which this suit seeks to cancel. And as a result of this transaction, Brim stood to profit personally.

(1) *The Belveal claims concerning the Mobil-Brim relationship.*

Against this undisputed, uncontradicted factual background, the Belveals would have this Court believe, and hold, that Brim was acting as Mobil's agent in the Brim-Athey-Hodgden transactions, and that whatever Brim then came to know, Mobil, in law, must be held to have known.

The Belveal premise indeed is that Mobil ratified, confirmed, participated in, enjoyed the fruits of, and for all purposes gave its blessings to the dealings of Brim, Athey, and Hodgden.

(2) *The facts concerning the Mobil-Brim relationship.*

It is interesting to compare the Belveal claims with the record facts:

Fact 1. In his dealings with Athey and Hodgden commencing in early 1962, Brim operated through an alias bank account in Oklahoma, and through names other than his own *to prevent Mobil from learning of his activities.* (Testimony of Brim, Ex. AF to Fourth Petition, Tr. 898-909.)

Fact 2. The fruits of Brim's dealings, as taken by Mobil, were bitter indeed. Brim, Athey and

Hodgden paid the Belveals *$105,000.00* for an undivided *1/7* interest in the lands in question; Brim then arranged for Mobil to buy a *1/14* interest in these lands from Athey for *$120,000.00* Brim shared in the proceeds of the sale to Mobil. (Brim's Testimony, Ex. AF to Fourth Petition, Tr. 938-940.)

Fact 3. Brim's agreement with Athey and Hodgden to acquire, in Athey's name, the Belveal properties, was reduced to writing in April, 1962, but Brim never showed the agreement to Mobil, nor did he ever advise Mobil of his dealings with Athey and Hodgden. (Brim's Testimony, Ex. AF to Fourth Petition, Tr. 934-936.)

Fact 4. The acquisition by Brim of mineral interests from Belveal was unknown to Mobil and its officers, agents and employees until the calendar year of *1964*. (Affidavit, J. T. Akin, Tr. 1105, affirming Par. X of Mobil Answer to Summary Judgment.)

Fact 5. Mobil did not have knowledge of any fraud or fraudulent acts, on the part of Athey, Hodgden or Brim, or any allegations or claims thereof, until the filing of this lawsuit and whatever knowledge, if any, Brim had was never imparted to Mobil. (Affidavit, J. T. Akin, Tr. 1105, affirming Par. XII of Mobil's Answer to Summary Judgment.)

Fact 6. When Mobil discovered Brim's extra-legal activities, Mobil instituted suit in Federal Court to establish that Brim breached his trust and violated his duties. (Ex. AE to Fourth Petition, Tr. 878.)

These are record facts. We *challenge* the Belveals to show to the Court even one record reference which ques-

tions, or in any way contests the conclusion that *Brim was dealing for self — not employer — when he dealt with Athey and Hodgden.*

We dwell at some length on this basic proposition conclusively established by this record for but one reason: If Brim's conduct, and his knowledge, are not imputable to Mobil, the Belveals have no case against Mobil. If the Belveals cannot tie Mobil to Brim, *in the very transactions complained of*, Mobil will ultimately be entitled to the rendition of judgment in its favor.

And so, against what are the uncontroverted facts, let us examine the law which must tell us if Mobil is to be charged with what Brim knew, and what he did.

(a) *Brim's conduct was adverse to Mobil and created in Mobil legal rights enforceable in law and equity.*

A breach of faith such as Brim's is chronicled in *Hunter v. Shell Oil Co.*, 198 F. 2d 485 (5th Cir., 1952). The facts of that case as set forth in the Court of Appeals opinion were:

> "From 1930 to 1941, when he was discharged, the defendant Hunter was employed by Shell Company as senior geologist in its Houston office, where he was in direct charge of Shell's extensive exploration activities in a large area along the Gulf coast of Texas and Louisiana. Hunter's principal duties were to collect geological and geophysical information for use by Shell and to advise the company where to purchase oil and gas interests, where to drill test wells, and the like, for which purpose he was employed and paid full time. This information was

highly confidential. Hunter's relationship with Shell was of a fiduciary nature, in which the utmost good faith is mandatory. At all times during Hunter's employment, Shell had a rule prohibiting its employees from acquiring royalty and other mineral interests. This rule applied to Hunter, and he was aware of it.

"Early in 1941, Shell discovered that Hunter had been unauthorizedly divulging confidential information to one A. M. Joncas, one R. J. St. Germain, and to Southland Royalty Company, based upon which, and acting in numerous instances through the hereinafter mentioned corporations for concealment, they bought up royalty and other interests in oil lands discovered by Hunter in Texas, Louisiana and Arkansas, for which Hunter received, as his compensation for furnishing said information, fractional participations in their purchases. Sometimes these participation interests were taken by Hunter directly in his own name, sometimes under an alias, and in some instances through interests in some of the corporations involved. The company immediately discharged Hunter, and soon thereafter instituted these suits against him and some of those acting in concert with him in buying up mineral interests based upon Hunter's information. In its complaint, Shell prayed that each defendant be required to account for each of the interests so acquired by him, and that they be required to convey to Shell such of said interests as Shell should elect to recover, such conveyance to be conditioned upon Shell reimbursing defendants for the costs to them of such mineral interests.

"Shell asserts that by disclosing such confidential information, which was its exclusive property, and in aiding his associates to acquire the above mentioned mineral interests, Hunter breached his fiduciary duty to his employer; placed himself in a position where his personal interests conflicted with those of

his employer; and that in consequence Hunter and the persons and corporations who acquired mineral interests through his unauthorized disclosures, hold such interests as constructive trustees for Shell."

These facts resulted in the following holding by the appellate court:

> "An agent may trade for his own benefit outside the scope of his principal's business without being accountable for the profits realized. *But he is forbidden to deal with a subject matter of the agency, or to use for his own advantage information acquired while acting within the scope of the agency.* Nor may an agent put himself in a position in which personal interests may come into conflict with his duty to his principal, or which may afford him an opportunity to subordinate the interests of his employer to his own individual benefit while discharging his duties. Such conduct is not only morally wrong, it is contrary to public policy. *When property has thus been wrongfully acquired, equity converts the holder into a trustee, and compels him to account for all gains from such conduct.* Pratt v. Shell Petroleum Co., 10 Cir., 100 F. 2d 833, and cases cited text pages 836, 837; Ohio Oil Co. v. Sharp, 10 Cir., 135 F. 2d 303; Russell v. Republic Production Co., 5 Cir., 112 F. 2d 633; Barnsdall Oil Co. v. Willis, 5 Cir., 152 F. 2d 824; inden., 153 F. 2d 784; Trice v. Comstock, 8 Cir., 121 F. 620, 622-623, 61 L.R.A. 176; 2 Restatement Law of Agency, p. 83."

Pratt v. Shell Petroleum Corporation, 100 F. 2d 833 (10th Cir., 1938), was a suit brought by the oil company against one of its former employees who had been employed in a geological capacity, and who had acquired, in violation of a company rule of which he was aware, certain oil and gas interests in which the employer-com-

pany was operating, which acquisitions were based on geological information which had been acquired by the employee in the course of his employment. The court held:

> "An agent may traffic for his own advantage and benefit outside the scope of the business of his principal without being accountable for the profits realized. Latta v. Kilbourn, 150 U.S. 524, 14 S. Ct., 201, 37 L. Ed. 1169. *The inhibition is upon dealing with the subject matter of the agency and making use of information acquired while acting within the scope of the agency.* It is infidelity of that kind with opportunity of detriment to the principal subjects the unfaithful agent to liability for the gains and profits."

No better words may be chosen to describe the duty of Brim to Mobil than those of Mr. Justice Cardoza in the famous opinion of *Meinhard v. Salmon*, 249 N.Y. 458 (1928), wherein he declared:

> "Many forms of conduct permissible in a workday world for those acting at arm's length, are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior. As to this there has developed a tradition that is unbending and inveterate. Uncompromising rigidity has been the attitude of courts of equity when petitioned to undermine the rule of undivided loyalty by the 'disintegrating erosion' of particular exceptions. On this has the level of conduct for fiduciaries been kept at a level higher than that trodden by the crowd. It will not consciously be lowered by any judgment of this court."

The Texas rule is the same as that stated in the cases cited above. *Fitz-Gerald v. Hull*, 150 Tex. 39, 237 S.W.

2d 256 (S. Ct., 1951); *Smith v. Bolin*, 153 Tex. 486, 271 S.W. 2d 93 (S. Ct., 1954); *Omohundro v. Matthews*, 161 Tex. 367, 341 S.W. 2d 401; *Gaines v. Hamman*, 163 Tex. 618, 358 S.W. 2d 557 (S. Ct., 1962); *Barnsdall Oil Co. v. Willis*, 153 F. 2d 784 (5th Cir., 1946); *Nye v. Lovelace*, 228 F. 2d 599 (5th Cir., 1956); *Bishop v. United States*, 266 F. 2d 657 (5th Cir., 1959); *United States v. Bowen*, 290 F. 2d 40 (5th Cir., 1961).

Characteristic of these holdings is *Nye v. Lovelace*, supra, the most recent case involving an unfaithful servant who sought private gain to the detriment of his principal. It was there stated:

> "Here, an unfaithful servant, whose activities from the inception were in breach of heavy duties, undertook, with circumstances strongly suggesting a studied furtiveness, to capitalize upon the information which had come to him under an obligation of trust, and in doing so, he sought to make decisions and resolve questions for his principal in which he stood to gain or lose as self-interest prevailed or was submerged. That which he has obtained by these means, he must restore."

(b) *Since Brim was acting for himself, Mobil is not bound by Brim's conduct, or knowledge.*

It would be indeed anomalous if Mobil, the *victim* of Brim's wrongdoing, is regarded in law as *guilty* of Brim's wrongdoing. Yet such was the claim of the Belveal Motion for Summary Judgment, and such was the result of the trial court judgment. *No court has ever so held before.*

The Supreme Court states in *Cotton v. Rand*, 51 S.W. 835, 53 S.W. 343:

> "We are clearly of the opinion that such a breach of duty on part of an agent, unless condoned by the principal with a full knowledge of the facts, puts an end ipso facto to the agency. *The law requires fidelity of agents, and holds them no longer capable of representing their principals, when, without the knowledge of the latter, they acquire an interest in the matter of the agency adverse to that of their employer.*"

In *Holmes v. Uvalde Nat. Bank*, 222 S.W. 640 (Tex. Civ. App., err. ref.), the cashier of a bank, without the knowledge or consent of the directors entered into an arrangement for loaning money which was concealed from the bank directors. ("All of the testimony tended to show that appellant and Rheiner did not desire that the bank should know that Rheiner was lending money for appellant, but studiously concealed it from the bank.") Likewise, the record here shows that Brim did not want Mobil to know what was going on and studiously concealed the true facts from it. The discussion in the *Holmes* case includes the following:

> "The rule imputing notice to the principal of the acts of agents is usually based upon the theory that it is the duty of the agent to communicate to his principal the knowledge possessed by him relating to the subject-matter of the agency, and the presumption that he has performed that duty. But this presumption is destroyed where the agent, through nominally acting as such, is in reality acting in his own or another's interest, and adversely to that of

his principal. Mechem on Agency, Sec. 1815; Kauffman v. Robey, 60 Tex. 311, 48 Am. Rep. 264; Texas Loan Agency v. Taylor, 88 Tex. 47, 29 S.W. 1057; Allen v. Garrison, 92 Tex. 546, 50 S.W. 335; Cooper v. Ford, 29 Tex. Civ. App., 253, 69 S.W. 487; LaBrie v. Cartwright, 55 Tex. Civ. App., 144, 118 S.W. 785; Allen v. Railroad, 150 Mass. 200, 22 N.E. 917, 5 L.R.A. 176, 15 Am. St. Rep. 185.

"As said in the last-cited case by the Massachusetts' court:

> " 'The general rule is that notice to an agent, while acting for his principal, of facts affecting the character of the transaction, is constructive notice to the principal. * * * *There is an exception to this rule when the agent is engaged in committing an independent fraudulent act on his own account, and the facts to be imputed relate to this fraudulent act. It is sometimes said that it cannot be presumed that an agent will communicate to his principal acts of fraud which he has committed on his own account in transacting the business of his principal, and that the doctrine of imputed knowledge rests upon a presumption that an agent will communicate to his principal whatever he knows concerning the business he is engaged in transacting as agent.* It may be doubted whether the rule and the exception rest on any such reasons. *It has been suggested that the true reason for the exception is that an independent fraud committed by an agent on his own account is beyond the scope of his employment, and therefore knowledge of it, as matter of law, cannot be imputed to the principal, and the principal cannot be held responsible for it.* On this view, such a fraud bears some analogy to a tort willfully committed by a servant for his own purposes, and not as a means of performing the business intrusted to

him by his master. *Whatever the reason may be, the exception is well established.*'"

See also *Richardson v. Wesley*, 1 S.W. 2d 1098; *Peterson v. Holland*, 189 S.W. 2d 94 (Tex. Civ. App., err. ref.); *Harrington v. McFarland*, 21 S.W. 116 (Tex. Civ App., writ den'd.); *Reed v. Hester*, 44 S.W. 2d 1107 (Comm. App.); and *Binder v. Millikin*, 201 S.W. 239 (Tex. Civ. App., err. ref.).

The El Paso Court of Civil Appeals dealt with the question in *Ziegler v. Federal Land Bank of Houston*, 86 S.W. 2d 864, err. dism'd., and expressly recognized and approved "*the rule that where a third person acts in collusion with the agent to defraud the principal, the latter will not be chargeable with any information which the agent receives pertaining to the transaction.*"

The many cases in accord include *T. P. Coal & Oil Co. v. Belcher*, 265 S.W. 1081, n.w.h.; *Parkersburg Rig & Reel Co. v. Golden*, 277 S.W. 1106, n.w.h.; *Brady v. Garrett*, 66 S.W. 2d 502, er. dism'd; *Ackerson v. Farm & Home Sav. & Loan Asso.*, 77 S.W. 2d 559, err. ref.; *Scripture v. Scottish-American Mortgage Co.*, 49 S.W. 644, err. ref.; *Campbell v. Crowley*, 56 S.W. 373; *Cooper v. Ford*, 69 S.W. 487, err. ref.; *Humphreys v. Stanford Sav. & Loan Asso.*, 80 S.W. 2d 438, err. ref.; *U. S. F. & G. Co. v. San Diego State Bank*, 155 S.W. 2d 411, err. ref., w.o.m.

These principles are by no means confined to Texas; it is held generally that the knowledge and conduct of an agent is not imputable to the principal where the agent

accepts money from an adverse party, has an adverse interest, *or acts in collusion to deceive his principal. 37 C.J.S.*, Fraud, Sec. 27, p. 269; *Barnsdall v. O'Day*, 134 F. 828; *Woteshek v. Neuman*, 138 N.W. 1000; *American Nat. Bank v. Miller*, 229 U.S. 517, 57 L. Ed. 1310; *Anderson v. General American Life Ins. Co.*, 141 F. 2d 898, cert. den., 323 U.S. 789, 89 L. Ed. 637; *Lea v. Iron Belt Mercantile Co.*, 42 So. 415; *Mott v. Nardo*, 166 P. 2d 37; *Reardon v. Mutual Life Ins. Co.*, 86 A. 2d 570; *Mutual Assur. Co. v. Norwich Sav. Soc.*, 24 A. 2d 477; *Vincennes Sav. & Loan Asso. v. St. John*, 12 N.E. 2d 127; *Nissen v. Nissen Trampoline Co.*, 39 N.W. 2d 92; *Newco Land Co. v. Martin*, 213 S.W. 2d 504 (Mo.); *Coronado-Inglenook Land & Development Co. v. Black*, 96 S.W. 2d 727; etc.

3 Am. Jur. 2d, Agency, Sec. 282, summarizes it as follows:

> "There is a well established exception to the general rule that the knowledge of an agent is to be imputed to the principal, in situations where the conduct and dealings of the agent are such as to raise a clear presumption that he will not communicate to the principal the facts in controversy, as where the agent acting normally as such is in reality acting in his own business or for his own personal interest and adversely to the principal, or is acting fraudulently against the interests of the principal, or for any other reason has a motive or interest in concealing the facts from his principal. This is the case where the agent is engaged in committing an independent fraudulent act on his own account and the facts to be imputed refer to this fraudulent act so that the communication of such facts to the principal would necessarily prevent the consummation of the fraud."

It also there stated:

> "This rule also applies where the agent is engaged in prosecuting some fraudulent or illegal enterprise the success of which would be impaired or defeated by the disclosure to his principal of the notice or knowledge sought to be imputed. In all such cases, it is obvious that the agent will not communicate the true facts to the principal and there is no latitude for any presumption that he will."

b. *Mobil's Status As A Bona Fide Purchaser*

The policy of the law is to protect the purchaser from secret titles, legal or equitable. *Fleming v. Ashcroft*, 175 S.W. 2d 401 (Tex. Sup. Ct.).

A bona fide purchaser of property from the apparent legal owner is afforded protection by the law, and he takes good title and may hold the property in question as against an outstanding equity or interest of a third person, or against any claim based upon fraud or mistake, or against a claim of constructive trust. *Jones v. Robb*, 80 S.W. 395 (Tex. Civ. App., err. ref'd.); *Wilson v. Meredith*, 268 S.W. 2d 511 (Tex. Civ. App., err. ref'd., n.r.e.); *Sydnor v. Roberts*, 13 Tex. 598; *Pure Oil Company v. Swindall*, 58 S.W. 2d 7 (Tex. Com. App.); *Schneider v. Sellers*, 61 S.W. 541 (Tex. Civ. App., err. dismd., w.o.j.). In *Sydnor v. Roberts*, it was expressly held, by the Supreme Court, to be a rule of law that a bona fide purchaser for value will be protected, whether he purchased from a fraudulent grantor or from a fraudulent grantee. This rule of law has always remained inviolate in this state.

A bona fide purchaser is one who makes a good faith purchase of real property for a valuable consideration without actual or constructive notice of an outstanding equity or an adverse interest or title. *Garrison v. Crowell*, 67 Tex. 626, 4 S.W. 69; *Middleton v. Johnston*, 110 S.W. 789 (Tex. Civ. App., err. ref'd); *Houston Oil Company v. Niles*, 225 S.W. 604 (Tex. Com. App.).

There is no question under this record but that Mobil paid a valuable consideration for its interests in the property in question. $120,000 was given for the 1/14 interest deed from Athey to Mobil in October of 1962 and this is undisputed. Also, the additional interest acquired from Brim resulting from the Federal Court action was supported by consideration which is undisputed (Affidavit of J. T. Akin, Tr. 1156-1158).

Under this record Mobil purchased the property in good faith, without notice of any outstanding equity. This is the entire burden of our prior argument that Mobil cannot, in law, be held to any knowledge acquired by Brim when Brim was acting in self-interest, though within the general employ of Mobil.

It must always be borne in mind that the Belveals, who asserted an equitable interest, had the burden of proof as against Mobil, the holder of legal title, to establish that Mobil was not a bona fide purchaser for value. *Tasher v. Foster Lumber Company*, 205 S.W. 2d 665 (Tex. Civ. App.); *Harvey v. Humphreys*, 178 S.W. 2d 733 (Tex. Civ. App.); *Teagarden v. Godley Lumber Company*, 154 S.W. 973 (Tex. Sup. Ct.).

Wherein did the Belveals carry this burden of proof? It can be said only that this record establishes that Brim was an employee of Mobil during the calendar year 1962, the period of time that Brim embarked upon his course of self-dealing which involved him in the Athey-Belveal transactions. Nothing further was proved by the Belveals that can in any way be claimed to represent *proof* that Mobil was not a good faith purchaser for value. But this proof is without legal signifiance. The Belveal claims —that Mobil's status as a good faith purchaser is destroyed by reason of the fact that Brim knew of and participated in the taking of the deeds from the Belveals, and that Mobil is charged with notice of all defects in the Athey acquisition of title because of Brim's participation — are answered by those cases already discussed wherein it is held that notice to a self-dealing agent is not notice to his principal.

We need not, however, be content with the general rules established by these cases; there is specific Texas authority which mercilessly exposes the flaws in the Belveal claim of destruction of Mobil's status as a good faith purchaser. We refer to those cases best illustrated by *LaBrie v. Cartwright*, 118 S.W. 785 (Tex.-Civ. App., 1909).

This trespass to try title action involved conflicting claims to a 600 acre tract originally owned by R. G. Cartwright. R. G. Cartwright deeded the land to Matthew Cartwright in 1845; this deed was not recorded. After R. G. Cartwright's death, his heirs conveyed to H. G.

Damon, for a valuable consideration. Damon had no actual notice of the prior deed; nor since it was unrecorded, did he have constructive notice. Damon was assisted in making his purchase by S. M. Johnson, who, the evidence revealed, knew of the earlier Cartwright deed but was to receive one-half of the sales price if a sale was made by the Cartwright heirs to Damon. Johnson then arranged the sale to Damon, *acting as agent for Damon.*

When the case was tried, the claimants under the first, but unrecorded, deed vehmently denied the status of good faith purchaser to Damon, saying, as do the Belveals here:

> "Your agent knew, therefore you knew of the earlier deed. Having such knowledge, in law, you are not a good faith purchaser."

The trial court accepted this contention. On appeal, however, the claim of notice through the self-dealing agent was summarily disposed of. The Court speaks thus:

> "We can see no escape for appellee from this proposition, for the doctrine that a principal is chargeable with notice known to his agent is based, not only upon the fiction of identity, but also upon the fact that it is the duty of the agent to communicate his knowledge to his principal, and the presumption that he has performed his duty. *No such presumption can arise, however, where the agent is dealing with the principal in his own interest, or where for any other reason his interest is adverse to his principal, so that it is to his own interest not to communicate the knoweldge to the principal.* In such a case the general rule, that notice to an agent is notice to his

> principal does not apply. Harrington v. McFarland, 1 Tex. Civ. App. 292, 21 S.W. 116; Kauffman v. Robey, 60 Tex. 311, 48 Am. Rep. 264; Texas Loan Agency v. Taylor, 88 Tex. 47, 29 S.W. 1057; Allen v. Garrison, 92 Tex. 546, 50 S.W. 335; Cooper v. Ford, 29 Tex. Civ. App. 253, 69 S.W. 487; Clark & Skyles on Agency, Sec. 485; Mech. Ag. Sec. 723. It is undisputed that Johnson had a half interest in the land and received such an interest in the proceeds of the sale of the same which he effected to Damon. Therefore, even if it should be conceded that he was Damon's agent in procuring his purchase of the land from the heirs of Robert G. Cartwright, his knowledge, if any he had, of the prior deed to Matthew Cartwright or the claim of appellee to the property, or of any fact sufficient to put him on an inquiry, could not, under the principle of law stated, be imputed to Damon."

The *Cartwright* opinion is obvigously correct. The case has been consistently cited with approval, and it is followed in legal principle by *Teagarden v. Godley Lbr. Co.*, 154 S.W. 973 (Tex. Sup. Ct. 1913). There Teagarden claimed equitable title to a 1/3 interest in a tract of land, legal title to which was in the Lumber Company. Teagarden claimed that he, one other adventurer, and Mr. Godley (the President of the Lumber Company) had agreed to speculate in land; that Mr. Godley was to take legal title, as trustee for the three partners, to lands acquired through their joint efforts. The three located and bought 1,111 acres and put title in Godley, as trustee. Godley then sold the land (pocketing the proceeds) to Coleman Lumber Company, which in turn sold it to Godley Lumber Company for a valuable consideration. Oddly enough, Mr. Godley was President of Coleman

Lumber Company also. Teagarden convinced the trial court that Godley Lbr. Co. was not a good faith purchaser for value, claiming, of course, that since Mr. Godley, a corporate officer, knew of Teagarden's equitable title the corporation itself must, in law, be charged with such knowledge.

The Supreme Court would not, and did not, so hold. The Court did hold:

> "The right of the plaintiff Teagarden in the land is an equity. The Godley Lumber Company has the legal title. The rule is that under this state of facts the burden was upon plaintiff to show notice to the Godley Lumber Company. Barnes v. Jamison, 24 Tex. 362; Baldwin v. Root, 90 Tex. 546, 40 S.W. 3; Rogers v. Houston, 94 Tex. 403, 60 S.W. 869.
>
> "There is no evidence of notice to either of the corporations except the undisputed fact that R. B. Godley was the president of each of them at the time the land was conveyed to him, and at the time the agreement was made between him and plaintiff for purchase of the land. By the allegations of the petition and the evidence it appears that Godley was acting for himself, and that he, in fact, sold the land to the Coleman Company for a valuable consideration. It has been well settled in this state that a principal, whether a corporation or natural person, is not affected by notice which comes to the agent or officer, unless such knowledge was acquired while in the transaction of the business of his principal. Texas Loan Agency v. Taylor, 88 Tex. 49, 29 S.W. 1057; Kauffman & Runge v. Robey, 60 Tex. 308, 48 Am. Rep. 264; 3 Cook, Crop. Sec. 727; Bank v. Loyhed, 28 Minn. 396 10 N.W. 421; Bank v. Brett, 62 Minn. 4, 63 N.W. 1067; Bank v. Sharpe, 40 Neb. 123, 58 N.W.

734; Terrell v. Bank, 12 Ala. 502; Cooper v. Ford, 29 Tex. Civ. App. 253, 69 S.W. 487.

* * * * *

"The right of action claimed by the plaintiff being an equity in the land and the legal title being in the Godley Lumber Company, the burden was on the plaintiff to prove that defendant had notice of his equity, or that it did not pay a valuable consideration therefor. There is no evidence that Godley represented the corporation in the purchase of the land, but the allegations of plaintiff's petition and his own evidence show that the purchase was made and deed taken to secure the land to the three persons, Godley, Rucker, and plaintiff, for sale to some sawmill for profit * * * Therefore the information of plaintiff's trustee acquired as such cannot be imputed to a purchaser from such trustee."

In *Bunton v. Palm*, 9 S.W. 182 (Tex. Sup. Ct., 1888), a claim of "knowledge to the agent — knowledge to the principal" was urged to defeat the status of a good faith purchaser for value. The agent in question was "acting for both buyer and seller, which is contrary to law and public policy." (9 S.W. at 184-185.) The Court held:

"But Palm, in fact, had no notice, actual or constructive, of any infirmity in Wells' title; on the contrary, Bergen assured him that it was good. It is not doubted that the principal, as a general rule, is bound by the knowledge of his agent, acquired either during or shortly before the employment commenced. In this case, however, Bergen was acting for both buyer and seller, which is contrary to law and public policy. Story, Ag. Secs. 210-212. Palm does not appear to have known that Bergen was acting as agent for Wells, or to have discovered that fact until this trial. Under these circumstances, to charge him with Bergen's knowledge would be equivalent to charging him with

the knowledge of Wells, whose agent Bergen was, and would be manifestly unjust, and unsupported by any of the analogies of the law. The reason for charging the principal with the knowledge of the agent is that the agent is supposed to represent the interest of the principal. In this instance Bergen was as much the representative of Wells as of Palm, and for that reason we are of the opinion that Palm cannot be charged with Bergen's knowledge."

And in *First Texas Joint Stock Land Bank v. Chapman*, 48 S.W. 2d 651 (Tex. Civ. App., 1932), the Court held:

"* * * if it be said that those two persons, or either, was such agent of the appellant bank as to ordinarily affect it with their knowledge, and that they knew or ought to have known that the land involved was the homestead of the Chapmans in October, 1918, as appellant alleged, their acts in the matter constituted such fraud as will relieve the appellant bank from the burden of such agent's knowledge, if any, of the invalidity of the note and trust deed to the City National Bank of Decatur. The authorities are uniform to the effect that a principal is not affected by notice to an agent who is acting adversely to the interests of his principal, and either for his own benefit or for the benefit of a third party * * *

"And in Pickett v. Dallas Trust & Savings Bank, 24 S.W. 2d 354, the Commission of Appeals said, among other things, that: '* * * If Fannin was not acting in good faith with his principal, the principal was not bound by the knowledge of the facts for the reason that Fannin thereby became a party to the fraud and the agent of the persons he collusively served.'

"See also, Kauffman & Runge v. Robey, 60 Tex. 308, 48 Am. Rep. 264; Texas Loan Agency v. Taylor, 88 Tex. 47, 29 S.W. 1057; Teagarden v. R. B. Godley Lbr. Co., 105 Tex. 616, 154 S.W. 973."

Our research has not produced any cases which support the Belveal claim that Mobil's status as a good faith purchaser for value is destroyed by Brim's alleged knowledge of the details of Athey's acquisition of title.

3. Conclusion — Mobil's Deeded Lands

Had Brim not been engaged in a course of self-dealing, had he not put himself in a position adverse to Mobil, had he not been engaged in a personal fraud against Mobil — then perhaps the Belveals could validly claim that what Brim knew, Mobil knew. But these are not the facts here. This record places Brim right where he chose to be — squarely adverse to Mobil, in complete violation of his duties and obligations, engaged in a fraud against his employer.

Under these facts, the trial court erred most grievously in accepting the Belveal contention that the Belveals should take from Mobil those properties which Mobil bought in good faith, for a valuable consideration, on the sole basis that Mobil is charged with knowledge actually known only to Brim.

Once our courts determine, as we know they must after a full trial on remand, that Mobil was a bona fide purchaser for value of its mineral interests in the property in question, there will ultimately be a rendition of judgment for Mobil confirming Mobil's title to *this* property, in addition to its leasehold estate.

Mobil stands ready to make its proof on trial, after remand. Mobil will, we believe, prevail as a matter of law after a full trial. For these reasons we accept the El Paso Court's order of remand.

II. Procedural Due Process Was Afforded Petitioners

A. *Petitioners' Claims Re-examined.*

The Belveals would have this Court believe that Mobil contumaciously ignored a trial court discovery order, that the Belveals were thereby prevented from developing their case, and that the trial court thereafter punished Mobil by the entry of a default judgment under Rule 170, Tex. R. Civ. P.

Petitioners would have the Court believe that the State appellate courts over-turned this judgment without cause, thereby denying the Belveals due process of law.

B. *The Record Facts*

The record supports not even one of the Belveal claims. There was no disobedience. There was no deprivation of the right of preparation. There were no trial court sanctions sought, or entered, against Mobil. To the contrary, the record shows:

1. On November 30, 1966, Petitioners moved for discovery under Rule 167, Texas Rules Civil Procedure, to require the production of certain documents. (Tr. 172)

2. On December 31, 1966, the trial court entered its order permitting discovery (Tr. 326), and requir-

ing Mobil to produce certain documents on January 5, 1967. (Tr. 326)

3. On January 2, 1967, the trial court order was filed (Tr. 329), simultaneously with the filing of Mobil's objections to the Petitioners' *Motion.* (Tr. 322-325)

4. Mobil's counsel produced Mobil's records for examination in Fort Stockton, Texas (Petition, Appendix Exhibit K, pp. A39-40), but petitioners counsel felt they were "scanty," and "shed no light whatsoever upon the real issues in this case." (Petition, Ex. K, A40)

5. On January 12, 1967, Mobil filed objections to the trial court's Order. (Tr. 330-336)

6. Mobil's objections to the order for discovery were never heard nor determined by the trial court.

7. Petitioners, on January 25, 1967, twenty days after the date specified for production of documents, filed a 30-page Motion for Summary Judgment against Mobil (Tr. 1052-1082); this Motion makes no claim of disobedience, seeks the imposition of no sanctions under Rule 170, Texas Rules of Civil Procedure, and assets no right to a default judgment by reason of disobedience. To the contrary, the January 25, 1967 Motion asserted the absence of any fact issue and *moved for judgment under Rule 166A, Tex. R. Civ. P.*

8. No court has been asked to determine, and of course no court has determined:

(a) Did Mobil violate a discovery order;

(b) Was contumacious conduct involved;

(c) Are the harsh sanctions of Rule 170 here appropriate?

9. The trial court entered judgment on March 30, 1967, sustaining petitioners' Motions for Summary

Judgment (Tr. 1223). The judgment contains no recitations as to:

(a) Any alleged disobedience by Mobil;

(b) Any alleged contempt by Mobil;

(c) Any sanctions imposed under Rule 170, Tex. R. Civ. P.;

(d) Any entry of judgment by default.

C. Conclusion

Petitioners' denial of due process claims are woven from whole cloth. They are directly refuted by the record.

If, on January 5, 1967, counsel for petitioners really believed that Mobil has disregarded the trial court's order of December 31, 1966, is it unreasonable to assume that he would have brought this to the trial Court's attention?

The undisputed fact that he did not — that no motions were filed, no orders entered — demonstrates full well that the claim of disobedience is a straw man.

If, on January 25, 1967, counsel for petitioners really believed that he had been deprived of the opportunity of preparing his clients' case, due process of law allowed him to seek relief from the trial court. His failure to avail himself of the available remedies — his conscious move instead under the summary judgment rule — shows full well that he knew there had been no disobedience of the trial court order.

III. No Constitutional Rights Were Abridged

A. *Petitioners' Claims Re-examined*

Petitioners assert that the State Court has inflicted grievous procedural wounds by (1) requiring petitioners to try their case under the Texas form of action known as "trespass to try title," (2) denying petitioners the right to enforce a constructive trust, and (3) compelling petitioners to join indispensable parties upon re-trial of this action.

B. Analysis of the State Court Judgment

1. *Form of action chosen by Petitioners.*

The State Court of Appeals was presented an appeal from a trial court judgment drawn by counsel for petitioners (Tr. 1197), based upon a 391 page Fourth Amended Original Petition filed by counsel for petitioners (Tr. 580).

The State Court's study of these instruments led the court to conclude:

> "The plaintiff-appellees in their petition alleged:
>
> > "'Plaintiffs bring this suit to set aside certain deeds and to recover possession and title to certain property which was taken from them by the fraud of defendants and which property defendants still fraudulently retain.
> >
> > "'Plaintiffs claim that they are entitled to ownership, title and possession of the following interest in lands and are entitled to have certain deeds set aside and to have adjudication of or

reconveyance to them of ownership, title and possession of the following interest in lands: * * *'

"They then pleaded their title from [illegible]e sovereignty of the soil, maintained that the cou[illegible]had jurisdiction of the out-of-state defendants under Article 1975 (because the suit was one for an interest in land), and they prayed for an award of title and possession. Their motions for summary judgment recite that they are based on their pleadings."

"Plaintiffs now disavow the trespass to try title action and maintain that the judgment can stand solely on their action for cancellation of the deeds under the claim of fraud and breach of fiduciary relationship. The judgment ordered cancellation of the deeds, ordered the defendants to execute various deeds to plaintiffs and their attorneys, and ordered the defendants to account for rents and revenues accrued during their possession. Thus the plaintiffs obtained all which they could have obtained under the trespass to try title count, and much argument is presented as to whether this was or was not such an action. Since plaintiff-appellees now urge that theirs is not a trespass to try title action, in the face of such abandonment it is probably unnecessary to consider such form of action as supporting the summary judgment rendered. *But* they also seek to rely on legal reasons to support the judgment — deeds improperly notarized and acknowledgments of some deeds by a party in interest — and they seek to show their establishment of a chain of title by reference to their pleadings."

"In Land v. Turner, 377 S.W. 2d 181 (Tex. 1964), the Supreme Court summarized the burden of plaintiffs-appellees under this count:

> "'To recover in trespass to try title, the plaintiff must recover upon the strength of his own title. Hejl v. Wirth, 161 Tex. 609, 343 S.W. 2d

> 226 (1961). He may recover by (1) proving a regular chain of conveyances from the sovereign, (2) by proving a superior title out of a common source, (3) by proving title by limitations, or (4) by proving prior possession, and that the possession had not been abandoned.'
>
> "Each of these is an independent ground of recovery, but none of them were proved in the summary judgment action before us, so that the judgment cannot stand on such grounds in any event, whether abandoned or not."

It is perfectly obvious that the State court was analyzing what the record contained — not dictating the future course of this litigation. And so the Court observed

> "Plaintiffs pleaded and admitted the execution and delivery of the deeds, their acceptance and retention of the consideration, and the present possession of the lands by the defendants. They contend that they should not be bound by them because of a form of fraud arising out of the deeds having been delivered in blank as to the grantee, the insertion of the name of defendant Athey as such grantee, and the existence of a fiduciary relationship between them and Athey. Stripped of the trespass to try title count, the plaintiffs' cause of action is one for cancellation of deeds by the grantors for fraud. Yet the judgment goes farther. It first cancels the seven deeds in which the plaintiffs are grantors and Athey is the sole grantee. If then orders Athey and the other defendants to execute deeds of special warranty to the plaintiffs and their attorneys, and to execute certain deeds between the various defendants, some conditioned on the delivery to the clerk of the court of other deeds, apparently to make up deficiencies and correct inequities among those defendants who were strangers to the canceled instruments, but deraigned their title thereunder. The

various defendants were ordered to account for rents and revenues accrued during their possession, and in turn were to receive back out of such funds the consideration paid for their deeds. This being a summary judgment case, when we speak of the evidence or proof throughout this opinion, it will mean that we have viewed same in the manner required under Rule 166-A, T.R.C.P., as to which see Great American Reserve Ins. Co. v. San Antonio Pl. Sup. Co., 391 S.W. 2d 41 (Tex. 1965). If we assume that the proof was sufficient to warrant cancellation (but we expressly find that it was not), the judgment rendered cannot stand, for it goes beyond cancellation, and, in effect, grants recovery as though in trespass to try title. Cancellation was a necessary preliminary step to recovery of the land. Chicago T. & M. Ry. Co. v. Titterington, 84 Tex. 218, 19 S.W. 472; Deaton v. Rush (1923), 113 Tex. 176, 252 S.W. 1025. But the establishing of an equitable right — that they were entitled to cancellation — and the simple act of cancellation, could not operate to take the land away from all who were in possession under claims of title and restore it to plaintiffs. As a very practical matter, the solemn act of canceling the deeds — that they 'be set aside, voided and held for naught' — left nothing to be conveyed, as thereafter ordered by the judgment, and certainly nothing to warrant as title.

"Very simply stated, the suit was for cancellation, but the judgment was for complete recovery of the land, and it was against all parties claiming an interest therein. Athey was the only defendant who was a party to the canceled instruments. The other defendants were in possession under duly recorded deeds. Not being a party to the instruments sought to be canceled, they could have been made parties to the conflict only because of their interest in the land. Clearly, then, the judgment operates as an adjudication of title to an interest in land."

Petitioners' complaints should be directed at their own counsel and not at the Court below. It was these lawyers who sued for title and possession and who pleaded a chain of title, thus casting the suit as one in trespass to try title.

2. *Indispensable parties are lacking.*

As an element of their case to prove title to the lands here involved, the Belveals sought cancellation of seven deeds executed by them in 1962, which deeds conveyed record and legal title to Charles Athey.

Had no transfers of title been made between March 29, 1962 (the date of the questioned deeds) and March 30, 1967 (the date of judgment), there would be no problem of parties. But this record shows without dispute:

1. Following delivery of the 1962 deeds by the Belveals, Charles Athey conveyed mineral interests to Jack L. Russel and Childress Royalty Company. (Mineral Deeds, Ex. 3 and 5, Ex. Volume.)

2. Following delivery of the 1962 deeds Charles Athey executed an oil and gas lease on the property covered by the deeds. This leasehold estate is, or has been, claimed, in whole or in part, by Robert R. South, Midwest Oil Corporation, Ralph Lowe, Inc., Horace Smith and Redco Inc. (Oil & Lease, Ex. 10; Assignment of Oil and Gas Lease, Ex. 11-14, 32, all found in Exhibits Volume.)

3. After severance of the mineral estate by deed and lease as above described, a series of conveyances vested title to overriding royalty interests in the Belveal-Athey properties in Betty Whitehead; Pittsburg National Bank and H. A. Bergstrom; Mrs. Hugh Frenzel; N. B. Turner; Fred Goodman; Charles Perry; John J. Dorr; Duane J. Magee; Midland National Bank; Clayton Williams; Coyanosa Company; and Scope Royalty Co. (Assignments of Overriding Royalty and Conveyances of Royalty, Ex. 15-13, all found in Exhibits Volume.)

It is obvious that every person, every company, every bank listed in the foregoing paragraphs has had his title affected by the decree of cancellation. If the Belveals' deeds to Athey *are cancelled, set aside and held for naught as the trial court ordered,* then every person named has lost title to real property without every being allowed the opportunity to appear and defend his title.

The Supreme Court of Texas, in *Sharpe v. Landowners Oil Ass'n.*, 127 Tex. 147, 92 S.W. 2d 435, has held:

> "It is settled beyond all question in this state that in a suit to cancel a written instrument all persons whose rights, interest, or relations with or through the subject matter of the suit will be affected by the cancellation are necessary parties. The absence of a necessary party in the suit for cancellation is fundamental and jurisdictional to such extent that it must be considered by this court."

The law recognizes that basic concepts of due process demand that a party to be affected by a judgment be given fair notice of the proceedings, and a fair opportunity to be heard. This recognition is given in the doctrine of *indispensable parties* — a doctrine designed by the courts to insure that no man's rights of contract or property will be altered without his presence in court.

In *Hill v. Carr*, 307 S.W. 2d 828, it was recognized that indispensable parties are those "whose interests will necessarily be affected by any judgment that may be rendered therein." The trial court could not, lawfully, enter judgment affirming the Belveals' claims unless and until all of the parties affected by such judgment were before the court. This was the exact holding of the court in the *Hill* case which in turn cited *Veal v. Thomason*, 138 Tex. 341, 159 S.W. 2d 472, the case universally recognized as the leading Texas authority on joinder of parties. After holding that the royalty owners were indispensable parties, Justice Critz, speaking for the Supreme Court in the *Veal v. Thomason* case, said:

> "There is no escape from this conclusion, because Thomason seeks in this action to obtain a judgment freeing this land from the Texas Company lease, and if this is done by judgment which names such company only, *the royalty owners under the other leases in this unitized block will have had such royalty interest in this land, for all practical purposes, cut off and destroyed without having had their day in court.*"

Other cases to similar effect are *Sharpe v. Landowners Oil Ass'n.*, 127 Tex. 147, 92 S.W. 2d 435; *Leach v. Brown*, 251 S.W. 2d 553, writ ref.; *Frost v. Stanolind Oil & Gas Co.*, 307 S.W. 2d 136, writ ref.; and *Royal Petroleum Corporation v. Dennis*, 332 S.W. 2d 313 (S. Ct.)

C. *Conclusion.*

The spectres which petitioners conjure up are self-made. Petitioners pleaded their case one way (for title and possession and cancellation of instruments), but now feel aggrieved that the courts have adjudged the case on this basis. Petitioners failed to join those parties whose joinder is necessary under State land law, and feel injured because the courts have held them to the requirements of State law.

Petitioners simply have no complaint that does not relate to the inadequacies of their own case.

IV. CONCLUSION

The respondents ask that the writ of certiorari here sought be denied. There are no substantial federal questions present in this case involving State land titles.

Petitioners were afforded substantive and procedural due process, and this case should now return to the Dis-

trict Court of Pecos County, Texas for trial on the merits of petitioners' claim to the deeded land in controversy.

It is urged that this writ be denied.

Respectfully submitted,

Jack T. Akin
Tom Sealy
Rush Moody, Jr.

W. B. Browder

W. B. Browder, Jr.

Of Counsel:
STUBBEMAN, MCRAE,
SEALY & LAUGHLIN,
P. O. Box 670,
Midland, Texas.

CERTIFICATE OF SERVICE

A true and correct copy of the above and foregoing Brief in Opposition to Petition for Writ of Certiorari has been forwarded to all counsel of record on this the 25th day of June, 1969.

W. B. Browder

W. B. Browder, Jr.

EXHIBIT "A"

SOCONY MOBIL OIL CORPORATION v. BELVEAL

OPINION

PRESLAR, Justice.

This is an appeal from an order granting the motions for summary judgment of the plaintiffs, Marion J. Belveal, Golda Belveal Branom, joined by her husband, Dudley Branom, Price M. Belveal, Martin E. Belveal, Will Wyler, Ernest Wyler, and Eldabell McKenzie joined by her husband, R. I. McKenzie, individually and as heirs of Myrtle Belveal, deceased, Ida Oberg, deceased, and Milda Wyler, deceased, against defendants Mobil Oil Corporation, Charles B. Athey and Jack D. Hodgden. All defendants appeal from such judgment, and additionally Mobil Oil Corporation assigns error in the failure of the court to grant its motion for summary judgment.

The order granting the plaintiffs' motions for summary judgment is reversed and remanded for trial, and the order is reversed and rendered as to that portion of Mobil Oil Corporation's motion for summary judgment which pertained to the cancellation of its oil and gas lease.

[1] The plaintiff-appellees in their petition alleged:

> "Plaintiffs bring this suit to set aside certain deeds and to recover possession and title to certain property which was taken from them by the fraud of defendants and which property defendants still fraudulently retain.
>
> "Plaintiffs claim that they are entitled to ownership, title and possession of the following interest in lands and are entitled to have certain deeds set aside and to have adjudication of or reconveyance to them of ownership, title and possession of the following interest in lands: * * *"

They then pleaded their title from the sovereignty of the soil, maintained that the court had jurisdiction of the out-of-state defendants under Article 1975 (because

the suit was one for an interest in land), and they prayed for an award of title and possession. Their motions for summary judgment recite that they are based on their pleadings. Plaintiff-appellees, by their motions for summary judgment action, did not offer proof of their chain of title, superior title from a common source, nor did they offer proof of negating the "not guilty" and specially pleaded defenses. Defendants urge that this is fatal to the judgment entered, and they urge that they were entitled to all defenses allowed by their "not guilty" pleas and their specially pleaded defenses of laches, limitations and prior uncanceled deeds between the parties. Plaintiffs now disavow the trepass to try title action and maintain that the judgment can stand solely on their action for cancellation of the deeds under the claim of fraud and breach of fiduciary relationship. The judgment ordered cancellation of the deeds, ordered the defendants to execute various deeds to plaintiffs and their attorneys, and ordered the defendants to account for rents and revenues accrued during their possession. Thus the plaintiffs obtained all which they could have obtained under the trespass to try title count, and much argument is presented as to whether this was or was not such an action. Since plaintiff-appellees now urge that theirs is not a trespass to try title action, in the face of such abandonment it is probably unnecessary to consider such form of action as supporting the summary judgment rendered. *But* they also seek to rely on legal reasons to support the judgment — deeds improperly notarized and acknowledgments of some deeds by a party in interest — and they seek to show their establishment of a chain of title by reference to their pleadings. As to that, suffice it to say that pleading are not the character of proof required for summary judgment. Rule 166-A, Texas Rules of Civil Procedure. In Land v. Turner, 377 S.W. 2d. 181 (Tex. 1964), the Supreme Court summarized the burden of plaintiffs-appellees under this count:

> "To recover in trespass to try title, the plaintiff must recover upon the strength of his own title. Hejl

> v. Wirth, 161 Tex. 609, 343 S.W. 2d 226 (1961). He may recover by (1) proving a regular chain of conveyances from the sovereign, (2) by proving a superior title out of a common source, (3) by proving title by limitations, or (4) by proving prior possession, and that the possession had not been abandoned."

Each of these is an independent ground of recovery, but none of them were proved in the summary judgment action before us, so that the judgment cannot stand on such grounds in any event, whether abandoned or not.

[2, 3] Plaintiffs pleaded and admitted the execution and delivery of the deeds, their acceptance and retention of the consideration, and the present possession of the lands by the defendants. They contend that they should not be bound by them because of a form of fraud arising out of the deeds having been delivered in blank as to the grantee, the insertion of the name of defendant Athey as such grantee, and the existence of a fiduciary relationship between them and Athey. Stripped of the trespass to try title count, the plaintiffs' cause of action is one for cancellation of deeds by the grantors for fraud. Yet the judgment goes farther. It first cancels the seven deeds in which the plaintiffs are grantors and Athey is the sole grantee. It then orders Athey and the other defendants to execute deeds of special warranty to the plaintiffs and their attorneys, and to execute certain deeds between the various defendants, some conditioned on the delivery to the clerk of the court of other deeds, apparently to make up deficiencies and correct inequities among those defendants who were strangers to the canceled instruments, but deraigned their title thereunder. The various defendants were ordered to account for rents and revenues accrued during their possession, and in turn were to receive back out of such funds the consideration paid for their deeds. This being a summary judgment case, when we speak of the evidence or proof throughout this opinion, it will mean that we have viewed same in the manner re-

quired under Rule 166-A, T.R.C.P., as to which see Great American Reserve Ins. Co. v. San Antonio Pl. Sup. Co., 391 S.W. 2d 41 (Tex. 1965). If we assume that the proof was sufficient to warrant cancellation (but we expressly find that it was not), the judgment rendered cannot stand, for it goes beyond cancellation and, in effect, grants recovery as though in trespass to try title. Cancellation was a necessary preliminary step to recovery of the land. Chicago T. & M. Ry. Co. v. Titterington, 84 Tex. 218, 19 S.W. 472; Deaton v. Rush (1923), 113 Tex. 176, 252 S.W. 1025. But the establishing of an equitable right — that they were entitled to cancellation — and the simple act of cancellation, could not operate to take the land away from all who were in possession under claims of title and restore it to plaintiffs. As a very practical matter, the solemn act of canceling the deeds — that they "be set aside, voided and held for naught" — left nothing to be conveyed, as thereafter ordered by the judgment, and certainly nothing to warrant as title.

[4-7] Very simply stated, the suit was for cancellation, but the judgment was for complete recovery of the land, and it was against all parties claiming an interest therein. Athey was the only defendant who was a party to the canceled instruments. The other defendants were in possession under duly recorded deeds. Not being a party to the instruments sought to be canceled, they could have been made parties to the conflict only because of their interest in the land. Clearly, then, the judgment operates as an adjudication of title to an interest in land. These strangers to the canceled instruments, who were in possession under deeds of record, have had their title and possession taken from them in a summary proceeding seeking cancellation. Such an action to cancel a voidable deed is characterized as an in personam action, rather than a suit for recovery of land. Deaton v. Rush, 113 Tex. 176, 252 S.W. 1025; Glenney v. Crane, 352 S.W. 2d 773, ref., n.r.e.; (but see Free v. Owen, 131 Tex. 281, 113 S.W. 2d 1221). Regardless of its characterization, it cannot operate to deprive these defendants of their title and pos-

session without an adjudication of the basis of their claims to such title. We think the judgment is also erroneous for that reason. Rule 789 provides that "Under such plea of 'not guilty' the defendant may give in evidence any lawful defense to the action except the defense of limitations, which shall be specially pleaded." This is held to include both legal and equitable defenses. Smith v. Baker (Civ. App. 964), 380 S.W. 2d 725; ref., n.r.e., 383 S.W. 2d 570. And where the defendant pleads "not guilty", the burden is on the plaintiff, as movant for summary judgment, to show that the defendant had no such defenses. Briggs v. Freeway Park Development Company, Tex. Civ. App., 366 S.W. 2d 270, ref., n.r.e.; Gage v. Owen, Tex. Civ. App., 396 S.W. 2d 189, n.w.h.; 56 Tex. Jur. 2d, "Trespass to Try Title", p. 248, § 119.

[8] We are of the opinion that the prior uncanceled deeds, pleaded by the defendants, is a bar to the judgment rendered. Two sets of deeds were executed by the plaintiff-grantors in this transaction. These deeds were identical as to the parties and properties, except that one set was on "Oklahoma forms", while the other set was on "Texas forms". This suit sought cancellation of the "Texas form" deeds only. When the transaction for the purchase-sale of the property was originally consummated, the deeds (seven in number) of the grantors were executed and delivered on the printed Oklahoma forms and the consideration of $105,000.00 was paid. About a week after the delivery of these deeds, on the suggestion of one who acquired an interest thereunder, seven new deeds were executed and delivered on printed Texas forms by all parties grantors. Both sets of deeds were executed in blank as to the grantee, the name of defendant Athey was inserted as grantee by him on these Texas form deeds, and they were thereafter filed for record in Pecos County. The Oklahoma form deeds still remain in the possession of Athey, uncanceled, and unchallenged in fact, and of a form sufficient to pass title fully under Texas law. Perhaps the situation is as simple as this: "A" having given two deeds to "B" conveying Whiteacre, and having sought

cancellation of only one of them, has gained nothing, for the other deed is still outstanding until canceled, even as was the one canceled. Whalem v. Richardson, Tex. Civ. App., 353 S.W. 2d 941, n.w.h., cites the controlling rule of law:

> "A deed obtained by fraud is not void but voidable only as between the parties to this suit, appellee's title is prima facie good, and it could only be avoided by decree annulling and cancelling the deed executed by appellants. Deaton v. Rush, 113 Tex. 175, 252 S.W. 1025; Michna v. Crane, Tex. Civ. App., 28 S.W. 2d 837; Wilkins v. Abercrombie, Tex. Civ. App., 162 S.W. 2d 445; Meiners v. Texas Osage Cooperative Royalty Pool, Inc., Tex. Civ. App., 309 S.W. 2d 898."

[9] The judgment is also erroneous in that there is an absence of necessary parties, which absence was raised by pleas to abate, and was not cured by the unilateral stipulation of the plaintiffs (referred to as paragraph 31 of their pleadings) as to any innocent purchasers for value.

On the basis of the foregoing, the judgment granting appellee-plaintiffs' motions for summary judgment is reversed and the cause remanded for trial.

MOBIL'S MOTION FOR SUMMARY JUDGMENT

[10] In addition to granting plaintiff's motions for summary judgment, the judgment here appealed from also denied the motion for summary judgment of Mobil Oil Corporation. By such motion Mobil contended that an oil and gas lease owned by it on a portion of the land involved was a valid and existing lease, and that the fee title it obtained to an undivided interest in the property should be upheld because it was an innocent purchaser for value. The granting of plaintiffs' motion for summary judgment, as noted, ordered the reconveyance of the fee title, and such order also ordered the cancellation of an oil and gas lease under which Mobil was operating and producing, and declared the interest unleased as of

March 20, 1962. The premises being in and a part of a unitization agreement, the order also substitutes the plaintiffs as members of such unit from the beginning and effective date of such unitization. Our reversal of such summary judgment order sends the mattter back for trial, but we are of the opinion that nothing more remains to be determined as to the cancellation of the oil and gas lease of Mobil, and that Mobil is entitled to judgment of rendition under its motion for summary judgment asking that the lease be declared valid. The original lease was for a ten-year term beginning March 19, 1952. On May 19, 1961, some ten months prior to expiration of the primary term, Charles Athey, individually, as trustee for others not parties hereto, and as attorney in fact for the plaintiffs and others, executed an extension agreement, extending the lease for a term of two years. It is this extension agreement which the plaintiffs attacked on the ground that it was secured through fraud and conspiracy or that Athey was without authority to extend the lease. We think the proof offered overcomes both of these contentions. Any and all acts relied on to establish fraud occurred long after the execution of the extension agreement on May 19, 1961, and there is no fact question as to fraud in the execution. The power of attorney under which Athey acted was executed by plaintiffs and other interest owners and placed of record in 1960. It provides Athey with the power to lease for such terms and prices as he sees fit, but does not specify that he can extend leases. We think the powers given are sufficient to cover the extending that was done here, for the instrument gave Athey the power to do any and everything about the premises which the grantors could do; also, in effect, the extension agreement was a lease. Even if the power did not exist in the instrument itself, the plaintiffs have accepted the benefits of the extension agreement, thus ratifying what was done, and have estopped themselves from now disavowing what was done, by standing by while Mobil expended large sums for development. Mobil paid $72,423.51 in consideration of the extension of the lease. The plaintiffs admit in their

pleadings and depositions that they received and accepted this money, and delay rentals under the extended lease were paid to the depository bank selected by the plaintiffs for the respective account of each. The action of the trial court in setting aside and holding for naught the Extension of Lease dated May 19, 1961, extending the oil and gas lease of March 19, 1952, recorded in Volume 192, page 368, Lease Records of Pecos County, Texas, is reversed and judgment here rendered declaring same valid.

[11] Mobil Oil Corporation's motions for summary judgment sought to validate its fee title to an interest in the property here involved on the basis that it was an innocent purchaser for value without notice of the alleged fraud. We are of the opinion that under the proof required for summary judgment this position is not established as a matter of law, and that a fact question exists. Mobil purchased its interest from Athey in October of 1962. The alleged acts of fraud are in connection with the sale by the plaintiffs to Athey in the early part of that year (March and April). One J. K. Brim, Jr., an employee and admittedly an agent for Mobil, participated in the transactions. Under ordinary circumstances, knowledge of the agent is imputed to the principal. But Mobil seeks to avoid this under an exception to the general rule, by showing that the agent was violating his duty to the principal and was on a course of dealing for himself.

[12, 13] A bona fide purchaser is one who makes a good faith purchase of real property for a valuable consideration without actual or constructive notice of an outstanding equity or in adverse interest or title. Garrison v. Crowell et al., 67 Tex. 626, 4 S.W. 69; Middleton et al. v. Johnston, 110 S.W. 789, Tex. Civ. App., err. ref'd; Houston Oil Company et al. v. Niles, 255 S.W. 604, Com. App. Our holding, as summarily stated earlier in this opinion, is that fraud was not established as a matter of law for purposes of summary judgment — that a fact question exists. That is not a finding that as a matter of law there was no fraud, but leaves the matter to be determined on trial. If in fact

there was fraud, Mobil's agent, Brim, was in a position to have knowledge of it. Mobil has the burden, as movant for summary judgment here, to establish as a matter of law that Brim was acting so contrarily to their interests as to except them from the general rule that notice to the agent is notice to his principal. The exception is a well established rule of law and is well-stated in Holmes v. Uvalde Nat. Bank, 222 S.W. 640 (Civ. App., err. ref.):

> "The rule imputing notice of the principal of the acts of agents is usually based upon the theory that it is the duty of the agent to communicate to his principal the knowledge possessed by him relating to the subject-matter of the agency, and the presumption that he has perfoimed that duty. But this presumption is destroyed where the agent, though nominally acting as such, is in reality acting in his own or another's interest, and adversely to that of his principal." (Citing numerous authorities).

We are of the opinion that the nature of Brim's acts, and the time of their commission as relates to the time of Mobil's purchase, are not so established as a matter of law as to bring them under the exception and entitle Mobil to summary judgment.

The order granting plaintiff's motions for summary judgment is in all things reversed and the cause remanded for trial; in its denial of Mobil's motion for summary judgment, the order is reversed as to the cancellation of Mobil's lease above described, and judgment is here rendered declaring such lease valid; and the denial of Mobil's motion for summary judgment is otherwise affirmed.